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TRANSPORTS

COMMITTEE

COMITÉ

RAILWAY

PAR CHEMIN DE FER

CASE/CAUSE NO:

VOLUME NO:

1

PLACE/ENDROIT: WINDSOR, ONT.

DATE: NOV. 28/77

OFFICIAL REPORTERS

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CANADIAN TRANSPORT COMMISSION

RAILWAY TRANSPORT COMMITTEE

IN THE MATTER OF an Application of Canadian Pacific Limited dated at Toronto, the 15th day of April, 1977 and captioned as follows:

IN THE MATTER OF The Railway Act, R.S.C. 1956 c. R-2 as amended, Sections 196, 197 and 216, The National Transportation Act, R.S.C. 1970 c. N-17 as amended, Sections 52, 57 and 63 and General Rules of Canadian Transport Commission, Rules 200, 250, 260, 275, 305 and 770;

AND IN THE MATTER OF a pedestrian crossing at mileage 109.30 of the Windsor Subdivision of Canadian Pacific Limited as shown on Plan and Profile No. G-1-114-A, dated April 14, 1975;

AND IN THE MATTER OF the opening for the carriage of traffic of a portion of the railway between mileage 108.35 and 109.68 of the said Windsor Subdivision known as the Powell Sidings.

File No. 49787

Hearing held in the Cleary Auditorium,
201 Riverside Drive West, Windsor,
Ontario, Monday, November 28th, 1977
at 10:00 a.m., Local Time.

BEFORE:

J. T. GRAY, ESQ., Q.C.

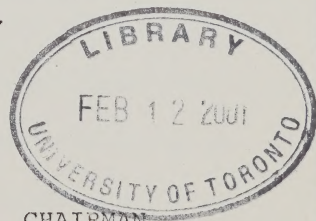
CHAIRMAN

J. M. WOODARD, ESQ.

COMMISSIONER

J. M. McDONOUGH, ESQ.

COMMISSIONER



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APPEARANCES:

MS. DEANA SILVERSTONE	Commission Counsel
N. A. CHALMERS, ESQ., Q.C.	Counsel for Canadian Pacific Limited
LEON PAROIAN, ESQ., Q.C.)	Counsel for
ROBERT DUMONT, ESQ.)	Robert Girard
IAN R. FISHER, ESQ.	Counsel for the City of Windsor

B. J. MacDONALD - Hearing Process Officer

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Per: M. J. Cornell, C.S.R.
N. Graham, C.S.R.
P. Cornell, C.S.R.



A.1
MJC/ko

--- Upon commencing at 10:10 a.m.

THE HEARING PROCESS OFFICER: Order
please. Order please.

Would everyone please rise.

THE CHAIRMAN: Good morning ladies
and gentlemen.

Everybody please be seated.

THE HEARING PROCESS OFFICER: The
case for hearing today is in the matter of an
Application of Canadian Pacific Limited, dated at
Toronto, the 15th day of April, 1977 and captioned
as follows:

IN THE MATTER OF The Railway Act, R.S.C.
1956 c. R-2 as amended, Sections 196, 197
and 216, The National Transportation Act,
R.S.C. 1970 c. N-17 as amended, Sections
52, 57 and 63 and General Rules of Canadian
Transport Commission, Rules 200, 250, 260,
275, 305 and 770;

AND IN THE MATTER OF a pedestrian crossing
at mileage 109.30 of the Windsor Subdivision
of Canadian Pacific Limited as shown on Plan
and Profile No. G-1-114-A, dated April 14,
1975;

AND IN THE MATTER OF the opening for the
carriage of traffic of a portion of the



1 railway between mileage 108.35 and 109.68
2 of the said Windsor Subdivision known as the
3 Powell Sidings. File No. 49787.

4 Presiding as Chairman at today's
5 hearing is Commissioner J. T. Gray, Q.C. On his
6 right is Commissioner J. M. Woodard. On the left
7 is Commissioner J. M. McDonough.

8
9 Could we now have the appearances,
10 please?

11 MR. N. A. CHALMERS: Mr. Chairman,
12 my name is Chalmers, initials N. A., one of Her
13 Majesty's Counsel. I appear for Canadian Pacific.
14 Subsequently in the hearing, with your permission,
15 sir, Mr. Michael McLearn will join us. He is not
16 here at the moment.

17
18 THE CHAIRMAN: Thank you.

19 MR. LEON PAROIAN: My name is Leon
20 Paroian, also one of Her Majesty's Counsel. I
21 represent Robert Girard. I have with me for part of
22 the time Mr. Robert Dumont who will address you, with
23 your permission, on one or two matters in which he
24 has done the preparation.

25
26 I should tell you that Mr. Dumont is
27 a student at law enrolled in the Bar Admission Course
28 and has been actively engaged in this file for the
29 last year and a half.
30



1 MR. CHALMERS: No objection to Mr.
2 Dumont.

3 MR. I. R. FISHER: My name is Ian
4 Fisher. I am appearing on behalf of the City of
5 Windsor.
6

7 MS. DEANA SILVERSTONE: My name is
8 Deana Silverstone and I appear on behalf of the
9 Canadian Transport Commission.

10 THE CHAIRMAN: Any other lawyers?

11 MR. A. J. CONEN: Mr. Chairman, my
12 name is August Conen and we have a question concerning
13 this Notice of Hearing most of which was just read by
14 the Clerk.
15

16 May we ask that at this time?

17 THE CHAIRMAN: Can we finish the
18 appearances first, Mr. Conen, and then hear you?

19 MR. CONEN: Thank you.

20 THE CHAIRMAN: Are there any further
21 lawyers representing clients?
22

23 I don't hear any further appearances.

24 I have had filed with me this morning
25 a number of appearances by people I presume who are
26 members of the public who probably wish to be heard
27 before the hearing is over.

28 I will go through them and if there
29 are any further members of the public here who wish
30



1 to appear, perhaps you would stand up and let me know.

2 I have Rene Giroux. Mr. Conen I guess
3 you just rose. Gordon L. Henderson. H. G. Barker.
4 Mrs. Shirley Charron. Dante Pellarin. Phyllis
5 Cheslea. Dr. James Bricker. Gabriel Charron.
6 Wilfrid Barclay, and that is the list.

7
8 Now are there any other members of the
9 public present this morning who wish to be heard?

10 MR. KEN MORRIS: Mr. Ken Morris.

11 THE CHAIRMAN: Ken Morris?

12 MR. MORRIS: Ken Morris, M-o-r-r-i-s.

13 THE CHAIRMAN: And a lady?

14 MRS. BEATRICE ASMAR: Mrs. Beatrice
15 Asmar.

16
17 THE CHAIRMAN: Thank you. Are there
18 any others?

19 MR. BERNARD NEWMAN: Bernard Newman,
20 M.P.P.

21
22 THE CHAIRMAN: Bernard Newman. Thank
23 you. Any others?

24 I don't hear any. Mr. Conen?

2 25 MR. CONEN: In the Notice of Hearing
26 that we received it is stated:

27 "That all parties wishing to
28 oppose the Application and all
29 interveners who wish to intervene in
30





1 order to support, oppose or modify the
2 Application must file written state-
3 ments together with any documents that
4 might be useful in explaining or
5 supporting any intervention as the
6 case may be to Mr. d'Avignon, Secretary
7 of the Railway Transport Committee and
8 shall also serve personally or by mail
9 a copy of said written statement on the
10 Applicant or its solicitor, Mr.
11 Chalmers, for Canadian Pacific in
12 Toronto.
13

14 "Evidence that the said written
15 statement has been served personally
16 or mailed to the Applicant or its
17 solicitor must also be served personally
18 or mailed to the undersigned."
19

20 It is that point to which we address
21 ourselves now.

22 I have my copy of my letter I sent and
23 is it the wish of this Committee that those copies be
24 affidavited?
25

26 Do you wish all these copies to receive
27 an affidavit to be presented?

28 MR. CHALMERS: I would respectfully
29 suggest, sir, that you waive that. If it assists Mr.
30



1 Conen and about two hundred members of the public who
2 wrote these letters most of them were good enough to
3 send me copies as your Notice, sir, requires and I am
4 prepared to admit receipt by me, as required by your
5 Order, and presumably by the Commission, and you will
6 know of any of the entire file that I have.
7

8 Now the odd person may have not sent
9 me a copy and I can't make admissions to those but I
10 don't think I need immediately that file. I had it
11 here and I can furnish it to your Clerk of Process
12 so that will help you because these people did all,
13 or many of them at least, many hundreds of them,
14 write to me. I have those letters.
15

16 THE CHAIRMAN: Well thank you, Mr.
17 Chalmers. I think that if I were to say a few words
3 18 that perhaps it would help to clarify the position of
19 the Commission.
20

21 In hearings of this type we normally
22 have two different types of people appearing. I guess
23 one you could describe as "parties" to the application
24 and the other we might refer to as public interest
25 individuals and I think that in the case of public
26 interest representations, namely letters that come in
27 from the public for people who wish to come and
28 present their views and not retain counsel and cross-
29 examine and so on -- we are normally much more relaxed
30



1 and lenient than we are with formal parties to the
2 application.

3 Mr. Conen I think that we have your
4 representations on file and you are entitled to come
5 and give your views and as Mr. Chalmers has waived any
6 objection he might have I don't think you need to file
7 any affidavits, sir.
8

9 MR. CONEN: We appreciate that.

10 We wonder why this sentence was put
11 into this Notice of Hearing and it was noticeably
12 absent in all the others and in fact did have a
13 negative effect on people who wish to send in letters.
14 It does tend to scare a person who is not familiar
15 with hearings.
16

17 THE CHAIRMAN: Well, Mr. Conen, if
18 you know of anyone who wishes to send a letter at any
19 time during the course of this hearing by all means
20 invite them to do so.
21

22 MR. CONEN: Thank you. We appreciate
23 that.

24 Also on the Notice of Hearing, on the
25 second page, it invited us if we wished to receive
26 a copy of the report of the inspecting engineer write
27 to Mr. Hibbard and I did so on November 12th and I
28 have had no reply to that, sir.
29

30 THE CHAIRMAN: Mr. MacDonald, do we



1 have copies of the Engineer's Report here available?

2 THE HEARING PROCESS OFFICER: I
3 believe we do, Mr. Chairman.

4 THE CHAIRMAN: Yes. Our Hearing
5 Process Officer, Mr. MacDonald, will be glad to
6 provide you with a copy. I am sorry that wasn't done
7 sooner.
8

9 MR. CONEN: Thank you very much.

10 I guess the last point that I would
11 like to bring up is the general question that the
12 people in our neighbourhood are asking and we have
13 not been able to respond and we hope that you would
14 and that is why are you here?
15

16 This situation began way back in '73
17 or thereabouts but the first time that we were
18 involved with the Canadian Transport Commission was
19 their copy of a telecommunication to the Canadian
20 Pacific Railway and it talks about, in that telegram,
21 that the Commission started communicating with the
22 CPR in December of 1974 concerning the tracks laid
23 and operated on without permission and it eventually
24 referred to letters written by the CPR of three or
25 four times that did not satisfy the Commission and it
26 eventually said:
27

28 "I am directed to advise you
29 that the Committee will tolerate no
30



further delay in this matter.

"You are therefore directed to show cause, within 15 days, as to why an Order should not be issued requiring the removal of or the cessation of train operation over the two railway sidings, one each side of the Windsor Subdivision main track and crossing of public pedestrian crossing at Parent Avenue."

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B-1

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1 And then the Commission had a hearing. And the
2 trains started operating again as this note, without
3 authorization in 1974, this was said in April 1975
4 and in September of 1976. In September of 1976 the
5 Commission finally said, you cannot operate over
6 these tracks any more.
7

8 After the start of public hearings
9 they permitted trains to be operated illegally for
10 over 13 months, to operate illegally for 13 months
11 until September of 1976. Then we had three
12 different continuations of hearings. And the end
13 result was the Railway Transport Committee said
14 the application is denied, you cannot run trains
15 over these illegally constructed tracks.
16

17 Now that is the understanding of our
18 people an application was denied. What are we
19 doing here? The solicitor for the Canadian Transport
20 Commission quoted the paper as saying:
21

22 "The opponents' argument that they
23 have no money to fight the railway
24 is weakened by the fact that they
25 were able to take the CTC to
26 Federal Court twice and appeal the
27 first decision to a higher court."
28

29 We do not know where she got her
30 information. We have been unable to raise at this



B-2

1 point \$15,000. And you gentlemen should well be
2 aware that costs far exceed that. What are you doing
3 here today? We don't know and we would like to know.
4 Is this going to go on and on? If it is CPR will win,
5 that's obvious. Thank you.

6 THE CHAIRMAN: Mr. Conen, the simple
7 answer to your question of why we are here today is,
8 as far as this panel is concerned, that we were
9 instructed to come here by the Canadian Transport
10 Commission to deal with an application by Canadian
11 Pacific, which so far as we know Canadian Pacific is
12 entitled to make. And if they file a proper
13 application to the Canadian Transport Commission, in
14 fact we have no choice but to hear it. And that's
15 why we are here today.

16 MR. FISHER: Pardon me, Mr. Chairman,
17 that is perhaps possibly a good point for me to make
18 an observation. I believe your words were as far as --

19 THE AUDIENCE: We cannot hear.

20 THE CHAIRMAN: Would you use the
21 microphone, please.

22 MR. PAROIAN: You will need it, I
23 won't.

24 MR. FISHER: Mr. Chairman, that raises
25 a very serious problem. I'm afraid your statement,
26 if I heard you correctly, was as far as you know you

27
28
29
30



B-3

1 have an obligation or duty to come here and entertain
2 an application. With all respect, sir, I have very
3 serious questions in that regard.

4 But before we get to that, what
5 disturbs me ever so much is, who if I may ask
6 respectfully sir, who decided that this application
7 would be heard, on what grounds was the decision
8 made to hear the application, why were no
9 representations entertained at a public hearing with
10 respect to that.

12 It seems to me, sir, there is a very
13 dangerous overtone to state as far as you know you
14 have jurisdiction to entertain this application. I
15 very, very seriously wonder if that's so. I endorse
16 completely the remarks of Mr. Conen with respect to
17 the never ending procession of applications and so
18 on by Canadian Pacific. And I am reminded, perhaps
19 this is time for another question. I am reminded of
20 the statement made by counsel for the Commission
21 last Monday before Mr. Justice Mahoney, that it was
22 the position of the Commission that individuals
23 could make as many applications as they like.

26 Now, I am asking at this point in
27 time, is that policy of this Committee, is it the
28 policy that someone can make as many applications as
29 they like? Ms. Silverstone, your counsel, I feel
30



B-4

1 make those remarks. If I misunderstood I call upon
2 her now to correct my thinking. If that is the
3 situation then I ask her that that be confirmed or
4 denied.

5 THE CHAIRMAN: Mr. Fisher, you are a
6 member of the legal profession. I am rather surprised
7 that you would ask a question of that type.

8 The statutory provisions are there.
9 An applicant can make an application any time it
10 wishes under those statutory provisions. An
11 applicant would, perhaps, not be very wise to make
12 two applications in a row on exactly the same facts.
13 Because I think in those circumstances he should be
14 expected to feel that he might not be very successful
15 at it. But so long as applications are made and the
16 Commission is there and the Parliament of Canada has
17 given the Commission the duty to hear those
18 applications and to decide those items, then I
19 think the Commission must do that.

20 MR. FISHER: May I ask, sir, what is
21 the statutory authority to entertain a second
22 application? And to reiterate your remarks, sir,
23 this is, and let us not forget, an application of an
24 identical nature. No where in the pleadings is there
25 any suggestion that there is any evidence available
26 now which was not or could not have been available
27
28
29
30



1 before Mr. Jones and the Board.

2 THE CHAIRMAN: Mr. Fisher, I think
3 that you are being a little premature. It seems to
4 me that until the Applicant has presented its evidence
5 we would not know that, will we?
6

7 MR. FISHER: No, but we do know what
8 the pleadings say, sir. And furthermore ---

9 THE CHAIRMAN: Gentlemen, I am afraid
10 I am going to have to interrupt you here. Applications
11 were made to the Court suggesting that this hearing
12 should not proceed. None of those applications has
13 been successful. We have come here to hear the
14 application. Our feeling is that we are under an
15 obligation to hear this application and we are going
16 to hear it.
17

18 MR. FISHER: May I ask you, sir, for
19 the record, under which section of which statute is
20 this Committee clothed with authority to entertain a
21 second application?
22

23 MR. CHALMERS: My submission with
24 great respect, Mr. Chairman, you do not have to submit
25 to cross-examination by counsel. I might add I do not
26 intend to cross-examine. If my friend, Mr. Fisher,
27 wants to make some sort of preliminary objection to
28 your proceedings, sir, I suspect that he has, I would
29 submit, a perfect right to do so. And if that's what
30



1 he's doing he should just state it without trying to
2 cross-examine you sir, and then possibly you might
3 wish to call on your own counsel or myself to argue
4 no doubt with Mr. Paroian. And then you might wish
5 to decide on the preliminary objections, if that's
6 what he is doing then in my submission, as far as
7 your Commission and my learned friends are too, I
8 do not think, sir, that you have to submit to cross-
9 examination by him.
10

11 MR. FISHER: I feel that I am
12 constrained to reply to that. Firstly, none of my
13 remarks, hopefully, are being construed as cross-
14 examination. But I do believe that after 2600
15 pages of transcript of full inquiry and so on, that
16 people are entitled to know the policy of a
17 Committee. And that's simply what I am asking you,
18 sir.
19
20

21 The second point is that as everyone
22 involved as counsel is very much aware, the decision
23 of Mr. Justice Maloney which was delivered last
24 Tuesday has been appealed. Now I am asking, amongst
25 other grounds, that that alone is sufficient, if for
26 no other reason, as a courtesy to the Court that this
27 matter not proceed at this time.
28

29 I again invite counsel for the
30 Committee to correct me if I am wrong, but the reasons



1 delivered by Mr. Justice Maloney, Mahoney pardon me,
2 are premised upon the fact that there has been a
3 decision related to the question of costs. There is
4 also an undertaking given by counsel to this
5 Commission, to myself, Mr. Paroian that this
6 application would not be proceeded with until such
7 time as there had been a decision on the question of
8 costs.
9

10 As far as I am concerned, sir, I
11 respectfully see that that undertaking is still
12 outstanding. If the undertaking is not outstanding
13 I again ask the following questions respectfully of
14 you, why is not outstanding? Who decided to change
15 it? For what reasons and upon whose representations?
16

17 THE CHAIRMAN: Mr. Fisher, to start
18 out with that is not the question which I am in a
19 position to answer because I had nothing to do with
20 the giving of any undertaking.
21

22 My understanding and my knowledge of
23 this matter is not at all complete, but my under-
24 standing was that that undertaking was given on the
25 basis of a certain factual situation which existed
26 at that time and which no longer existed.
27

28 But I am going to stop this discussion
29 at this particular stage and suggest to you that if
30 you wish to make a motion for a stay of this hearing



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or for an adjournment of this hearing, I am going to
give you or any other counsel an opportunity to do
that.

- - -



C-1

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1 You can advance all the arguments you wish in support
2 of your motion. Counsel that oppose your motion
3 will be heard and at the end of that time we will
4 make a Ruling and we will proceed from there.

5 MR. FISHER: I wish to entertain those
6 submissions at this point.

7 THE CHAIRMAN: Well, I think this is
8 the appropriate time to do it.

9 MR. FISHER: Very well.

10 The Decision of The Honourable Mr.
11 Justice Mahoney, which was delivered Tuesday last,
12 has been appealed. The Notice of Appeal was
13 delivered out of the City of Windsor by courier last
14 Thursday.

15 Now, reasons for judgment were not
16 released until Wednesday. The Notice of Appeal was
17 dated the same day. It left Windsor Thursday
18 because it had to be signed firstly by counsel. The
19 time limitations simply did not allow it to get out
20 any earlier. That, as far as I'm aware, is in the
21 process of being served. Mr. Chalmers might be of
22 some assistance. I would not be surprised if he
23 was served.

24 MR. CHALMERS: I have been served with
25 the Notice of Appeal.

26 MR. FISHER: That must have been last
27
28
29
30



1 Friday. Obviously, because the Deputy Attorney-General
2 and the Commission have offices in Ottawa, they could
3 not have been served on Friday. That appeal is
4 pending. That was an application for prohibition to
5 prevent this particular hearing from proceeding.

6 Now, I am asking for the third time,
7 counsel for the Commission to correct me if I am
8 wrong but the reasons of Mr. Justice Mahoney, if I
9 may read them now -- if I may read from page 3 of
10 the Reasons for Judgment of the Honourable Mr. Justice
11 Mahoney is as follows:
12

13 "On August 10, CP applied to the
14 respondent under the Sections of the
15 Acts and Rules previously referred to,
16 for an Interim Order pending the
17 outcome of its April 15 application,
18 permitting it to operate Powell
19 Sidings and open it for the carriage
20 of traffic. That is the application
21 at issue here."
22

23 I call upon Ms. Silverstone to advise
24 the Committee whether or not she agrees that there
25 are, unfortunately, possibly misinterpretations of
26 the facts which make the appeal logical. I am not
27 necessarily saying the appeal is going to be
28 successful but at least it will be correct to say
29
30



1 that there is room for suggesting that the learned
2 Justice misinterpreted the facts.

3 MR. CHALMERS: My learned friend can
4 argue his own motion. I take it it is a motion
5 for adjournment, he has not told us, but my learned
6 friend can argue that himself and presumably he will
7 call on Commission Counsel in due time.
8

9 MR. FISHER: Well, I must take this
10 position: Unless and until I am corrected by
11 counsel for the Commission I simply must presume I
12 am correct.

13 THE CHAIRMAN: Would you please run
14 that by me again?
15

16 MR. FISHER: I have made several
17 statements as to what I believe counsel for the
18 Commission has stated publicly on prior occasions.
19 Unless and until those statements are challenged by
20 my friend, Ms. Silverstone, I must assume they are
21 correct. Ms. Silverstone appeared before the
22 Federal Court on Monday last and argued on the under-
23 standing that it was the application dated April 15
24 which was at issue here. If the judgment refers to
25 an application dated August 10, obviously there has
26 been some misunderstanding.
27

28 Now, the judgment further goes on:

29 "The only basis that the outstanding
30



1 motion as to costs could support
2 such an order is that the undertaking
3 to defer requiring the Applicants to
4 plead to CP's April 15 application
5 extends to the August 10 application
6 is, in the circumstances, still
7 outstanding and is of a nature to
8 deprive the respondent of jurisdiction
9 to proceed until this condition is
10 fulfilled.
11

12 I take it that all other matters
13 respecting costs raised in argument
14 by the Applicants are registered in
15 Canada in the Trial Division of this
16 Court."
17

18 The most important is at the top of
19

20 page 4:

21 "I should be most reluctant to base a
22 decision adverse to the Applicants
23 on a finding that the undertaking
24 could be circumvented merely by
25 bringing an application for an Interim
26 Order, which if successful, would
27 for its term, achieve both what CP
28 sought and the Applicants opposed on
29 April 15 application. Rather, it is
30

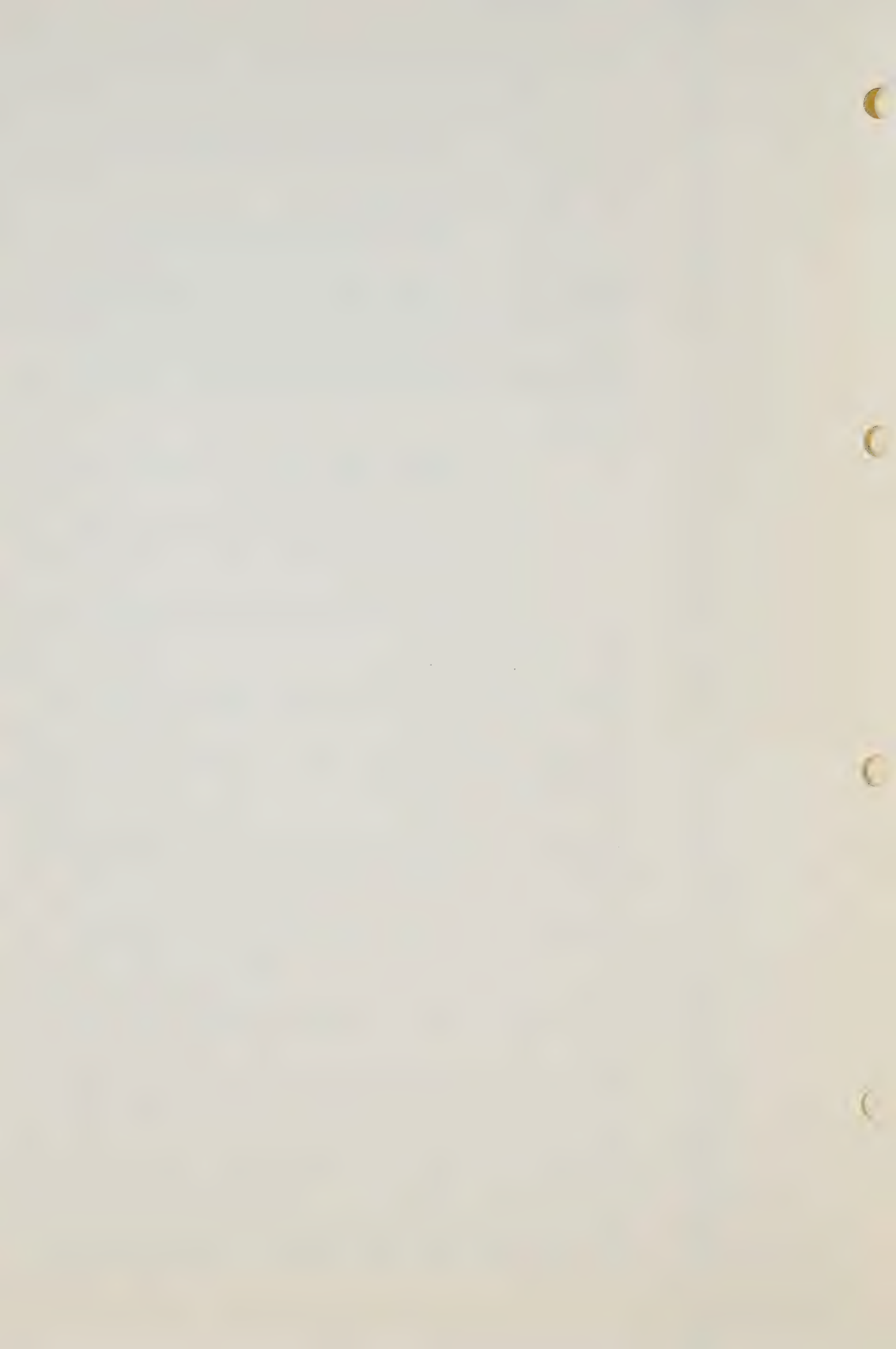


1 my view, that the undertaking is no
2 longer outstanding because a decision
3 on the motion for costs has in fact
4 been made."

5 Now, I ask you, Mr. Chairman, to
6 compare that to the comment of the Honourable Mr.
7 Justice Gibson, which judgment is also under appeal
8 and I might advise, where His Lordship indicates as
9 follows:
10

11 "From the material it appears that
12 no decision on the part of the
13 application relating to costs has
14 been made as yet by the Commission."

15 Now, we have a very curious situation. Two learned
16 Judges of the same Court have apparently come to
17 different conclusions. Both of those Judgments are
18 under appeal. I think it is a very curious position
19 that when one of them is under appeal there is an
20 Order of this Committee adjourning any further
21 matters dealing with that sine die. That is
22 adjourned sine die but, my goodness, when it comes
23 to an application by Canadian Pacific, an identical
24 application by Canadian Pacific, somehow a sense of
25 urgency develops and rulings are different and in
26 case there is any doubt about what I say, sir, I am
27 suggesting to you this: That, in June of 1975 there
28 was pages and pages and pages of evidence which
29
30





1 clearly indicated the illegal and unlawful
2 construction and use of Powell Sidings. It further
3 showed the preemptory commando-like conduct of
4 Canadian Pacific in fencing off the walkway
5 established by Board Order and posting an armed guard.
6 However, that situation, sir, after lengthy
7 argument was advanced by all counsel, that situation
8 was permitted to continue until September of 1976;
9 15 months go by with a flagrant violent violation of
10 the law but that did not appear to bother anybody.
11 When the application of Canadian Pacific is dismissed
12 by oral reasons on the 5th of April followed up by
13 written reasons on the 7th of April, Heaven for bid,
14 a tremendous urgency suddenly becomes involved.

17 Now, let me give a chronology of
18 events, if I may, since that time: The application
19 before you is dated the 15th day of April, 1977 but
20 follows eight days after a dismissal, in my view,
21 of an absolutely identical application. It is the
22 same trackage, it is the same walkway. It is the
23 same Hydro Electric transmission line. It is the
24 same pooling and ponding of water. There has been
25 absolutely no physical change whatsoever in Powell
26 Siding since the Decision of Mr. Jones and LaBorde
27 of April 7.

29 THE CHAIRMAN: Is that your evidence,
30



1 Mr. Fisher?

2 MR. FISHER: Again, that is on the
3 basis of the pleadings of Canadian Pacific. There
4 is no pleading sir, that evidence has become available
5 which was not available or that could not have been
6 available. They lost and they have the temerity
7 eight days later to say: Here we go again. That is
8 the first thing that happened.
9

10 On the 16th day of May, 1977 I
11 personally had a telephone conversation with Mr.
12 Keith Thompson. I was told by Mr. Thompson that a
13 letter would be coming saying that no pleadings would
14 be expected from the respondents until 30 days had
15 elapsed on the Judgment on the question of costs.
16 That was on the 16th of May.
17

18 On the 8th day of June I wrote to Mr.
19 Thompson:
20

21 "I confirm our telephone conversation
22 of May 16, 1977 wherein I was advised
23 of the response to be informed by the
24 Railway Transport Committee that their
25 answer would not be due until 30 days
26 had expired from the date that
27 Judgment be given on the Motion for
28 costs with respect to the first
29 application."
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THE CHAIRMAN: What was the date of
that letter again?

MR. FISHER: It is June 8th, Mr.
Chairman.

"I have not as yet received
communication to this effect from the
Railway Transport Committee.

"Would you kindly confirm that
the above sets forth the current position
of the Railway Transport Committee.

"Yours truly."

Then on the 27th day of June, 1977,
I received a letter from Mr. Keith Thompson, Senior
Counsel, Legal Services, Canadian Transport
Commission:

"Dear Sirs:

"I have been asked by the
Railway Transport Committee to advise
you that the Respondents will not be
compelled by the Committee to plead to
the new Canadian Pacific Limited
Application until the expiration of
30 days following the issuance of the
Decision on the Application for Costs
which arose out of the recently
concluded hearing in Windsor.



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"The foregoing action is being taken by the Committee in an effort to assist the Respondents in determining whether they ought to respond to the second Application.

"It is recognized that the Respondents have incurred legal costs arising out of the first Application and quite likely would like to have a determination on their Application for Costs before they retain and instruct counsel to commence any resistance to the latest Application."

I might add that Mr. Paroian received the same letter. Then a curious, with all respect, Order is issued by the Railway Transport Committee. That is Order Number R-25 112 and that has to do with the motion for costs which was made arising out of the first Application and it reads in part as follows:

"Whereas the Panel has been unable to agree to a Decision in the matter of the aforementioned motion for costs;

"Whereas the Railway Transport Committee pursuant to Section 63 of the National Transportation Act has



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therefore decided to re-hear the said motion before a new Panel constituted for that purpose, it is hereby Ordered that the said motion for costs be re-heard by the Railway Transport Committee pursuant to Section 63 of the National Transportation Act before a panel of commissioners constituted for that purpose at a public hearing to be held at Ottawa commencing on July 21st and that Notice be issued accordingly ..."

I would like to stop there and pause for a moment and make two observations. One, the Order is dated the 7th day of July, 1977 and it requires parties to be in Ottawa two weeks later when all the prior hearings had been here in the City of Windsor and at far more Notice than two weeks.

Then there is a letter dated the 12th day of July, 1977 -- this follows, of course, very shortly upon the heels of the Notice of Hearing for the purported re-hearing on the question of costs.

This is a letter from Mr. Leon Paroian, my friend, addressed to Mr. D. Scott, Legal Services, Canadian Transport Commission. Copies of that letter were sent, amongst other people, to several of the



D 4 1 citizens of Windsor.

2 The letter reads as follows:

3 "I thank you for your
4 assistance and your response to our
5 request made on July the 11th, 1977.

6 "We would confirm that our
7 request was that the Committee convene
8 in Windsor, Ontario to consider our
9 Application for Costs. We also suggest
10 that the hearing date might be enlarged
11 as it was fairly short notice.
12

13 "We indicated to you the
14 economics of our having to travel to
15 Ottawa and the fact that our clients
16 are vitally interested and have
17 demonstrated their interest by being
18 in attendance at the hearings previously
19 held in Windsor and that the Committee
20 had established a precedent by
21 convening all of its other hearings
22 relevant to this matter here in
23 Windsor.
24

25 "Later in the afternoon you
26 advised that you had spoken to the
27 Committee and they refused our request
28 on the basis that they had other
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engagements in Ottawa which prevented them from attending a hearing in Windsor.

"You further advised that the Committee did not believe it was short notice as we should be in the position to argue the question of costs with very little preparation as we argued it in the past.

"You confirmed that you had been instructed not to reveal the names of the Panel even though you had volunteered to do so earlier.

"The reasons that you gave for the Committee not extending the time was that it was in the interest of the CPR so to do as their second application is being delayed and it was in the public interest so to do.

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"As to the last proposition I voiced very strong objections and pointed out that this matter has been in progress now in excess of two years and that none of the delays occasioned were in any way attributable to the objectors.



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"I confirm that the CPR operated those tracks unlawfully from August 1974 to September '76. The first hearing convened in June of '75 and adjourned through to September 2976. The CPR continued to use most of the tracks during that period.

"The hearing was not reconvened, albeit strong representations were made by the objectors and others to bring the hearing back on -- that process took some 15 months. It would be difficult to explain to our clients how that delay could not be overcome because it is now in the public interest or is it the CPR's interest to bring it on immediately?

"I renew my request as confirmed by Ian Fisher's telegram and as supported by Mr. Kellerman, that the hearing be held in Windsor at a time mutually convenient to all of the parties and the Commission.

"We hope that the Committee will reconsider its refusal to grant that application."



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And then Mr. Paroian concludes by
saying again:

"Thank you for your co-
operation."

Now the next step was a motion which
was brought on behalf of the City of Windsor, Dr.
Bricker, Dr. Henderson and Mr. Girard for an Order
prohibiting a new panel from purportedly re-hearing
the question of costs.

That motion was argued in front of
The Honourable Mr. Justice Gibson. It was not
successful. That is under appeal.

The Railway Transport Committee then
issued an Order or -- pardon me. Upon being served
with the Notice of Prohibition issued an Order
adjourning sine die the hearing as scheduled in
front of a new panel and I might pause there and say,
curiously, that policy was not used in the present
situation.

Then by Application dated the 10th
day of August, 1977, the Canadian Pacific purports
to apply for interim operating authority. On the
21st day of August ---

THE CHAIRMAN: Go ahead.

MR. FISHER: On the 23rd day of
August, 1977, I responded to that Application by



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1 letter addressed to the Secretary of the Railway
2 Transport Committee. It reads as follows (that
3 letter was delivered by courier by the way):

4 "I acknowledge receipt of a
5 copy of a letter dated August 8th,
6 1977 from Canadian Pacific addressed
7 to the Secretary of the Canadian
8 Transport Commission.
9

10 "I also acknowledge having
11 received on the 17th day of August a
12 copy of the Application of CP dated
13 the 11th day of August, '77 for an
14 interim order permitting the carriage
15 of traffic over the Powell Sidings.
16

17 "I have been absent from the
18 office on vacation from the 8th day of
19 August, '77 to the 22nd day of August,
20 1977. I confirm my telephone
21 conversation with Mr. G. W. Nadeau
22 on the 22nd day of August (that was
23 the day of my return) wherein I
24 expressed my very firm objections to
25 the Railway Transport Committee
26 entertaining at this time any appli-
27 cation by Canadian Pacific Railway
28 with respect to the carriage of traffic
29
30



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over Powell Sidings.

"I very strongly urge the following point to be borne uppermost in mind.

"The Application of Canadian Pacific Railway to open Powell Sidings for the carriage of traffice was dismissed by the Decision of the Railway Transport Committee on the 6th day of April, 1977 ..."

Well that is a mistake. It just have been either the 5th or the 7th but it said the 6th.

"... following a public hearing resulting in some two thousand pages of transcript ..."

That is also wring. It's about 2600 pages of transcript:

"... on the 15th day of April, 1977 Canadian Pacific caused to be filed a 'fresh application'.

"No decision as yet has been made with respect to the motion for costs.

"The dismissal of the application to the Federal Court, Trial Division, for prohibition has been



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1 appealed and the Federal Court,
2 Appeal Division, has been advised
3 of the writer's intention to
4 prosecute an appeal as expeditiously
5 as possible.

6 "The application by the
7 Canadian Pacific for a re-hearing may
8 only be made with the leave of the
9 Railway Transport Committee. The
10 Respondents have been advised that
11 the Railway Transport Committee shall
12 not require a reply to the fresh
13 application until 30 days have expired
14 from the date the decision was given
15 with respect to the motion for costs.

16 "While no reply to the fresh
17 application has been filed due to the
18 Directive of the Committee, such reply
19 would, amongst other things, raise the
20 issue that the course adopted by
21 Canadian Pacific Railway constitutes
22 a flagrant abuse of process.

23 "The fresh application alleges
24 in paragraph 8(d) that a full inquiry
25 was not conducted.

26 "It is my firm position that
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Canadian Pacific ought to have
appealed the decision of the Railway
Transport Committee if there was any
substance whatsoever to this allegation.

"Furthermore paragraph 8(b)
contains the insulting suggestion
that the conduct of Canadian Pacific
is immaterial to the present appli-
cation.

"The curious position being
taken by Canadian Pacific Railway,
in my respectful opinion, is bared
even further in the last sentence in
paragraph 4 of the application for
the Interim Order where the Railway
takes the position that the said
application ought to be heard without
the necessity of an oral hearing.

"I cannot emphasize strongly
enough my objection to such a course
being adopted. To suggest that
Canadian Pacific Railway may, in the
first place, make a fresh application
immediately upon the heels of a
dismissal of an application that
concerned some 2000 pages of transcript



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can only be described as an insult to both the Railway Transport Committee and the Respondents who have appeared before said Committee.

"Secondly to suggest that the Railway Transport Committee ought to entertain an application for interim operating authority before said Committee has even granted a re-hearing can only be described as ridiculous.

"Finally to take the position that the Railway Transport Committee ought to entertain an application for interim operating authority without conducting a public hearing flies in the face of virtually each cannon of the rules of fundamental justice.

"The application for interim order indicates at the bottom of page 4 thereof that the interveners are required to deliver their replies to said application within such time that the Railway Transport Committee might require.

"Would you kindly advise at your earliest opportunity of the



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1 position of the Committee with
2 respect to whether or not a reply is
3 required and if so by what date.

4 "Yours truly."

4

5 Now, Mr. d'Avignon saw fit not to
6 reply to that letter. I will have more to say about
7 Mr. d'Avignon's failure to respond to communications
8 a little later on in another point in time but no
9 response received to that.
10

11 My letter dated September the 12th,
12 my learned friend, Mr. Paroian, endorsed the comments
13 I made in the letter that I just read to you.
14

15 By letter dated September 16th, 1977,
16 Mr. Kellerman, the City Solicitor, adopted the views
17 that I expressed in that letter too and then on the
18 6th day of October, 1977, somehow the matter for an
19 application for interim authority is forgotten and
20 now we are faced with a Notice of Hearing for the
21 fresh Application. Nothing said by Mr. d'Avignan
22 to us. No explanation is given. No nothing. I
23 write the letter I referred to supported by my
24 friends and the next thing we have is a Notice of
25 Hearing for the fresh Application.
26

27 Then the undertaking of the Railway
28 Transport Committee is -- let me put it charitably,
29 reviewed by Mr. Thompson, Mr. Keith Thompson in a
30



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1 letter dated the 7th day of October, 1977 and Mr.

2 Thompson writes to me as follows:

3 "Dear Sir:

4 "In my letter of June 27th

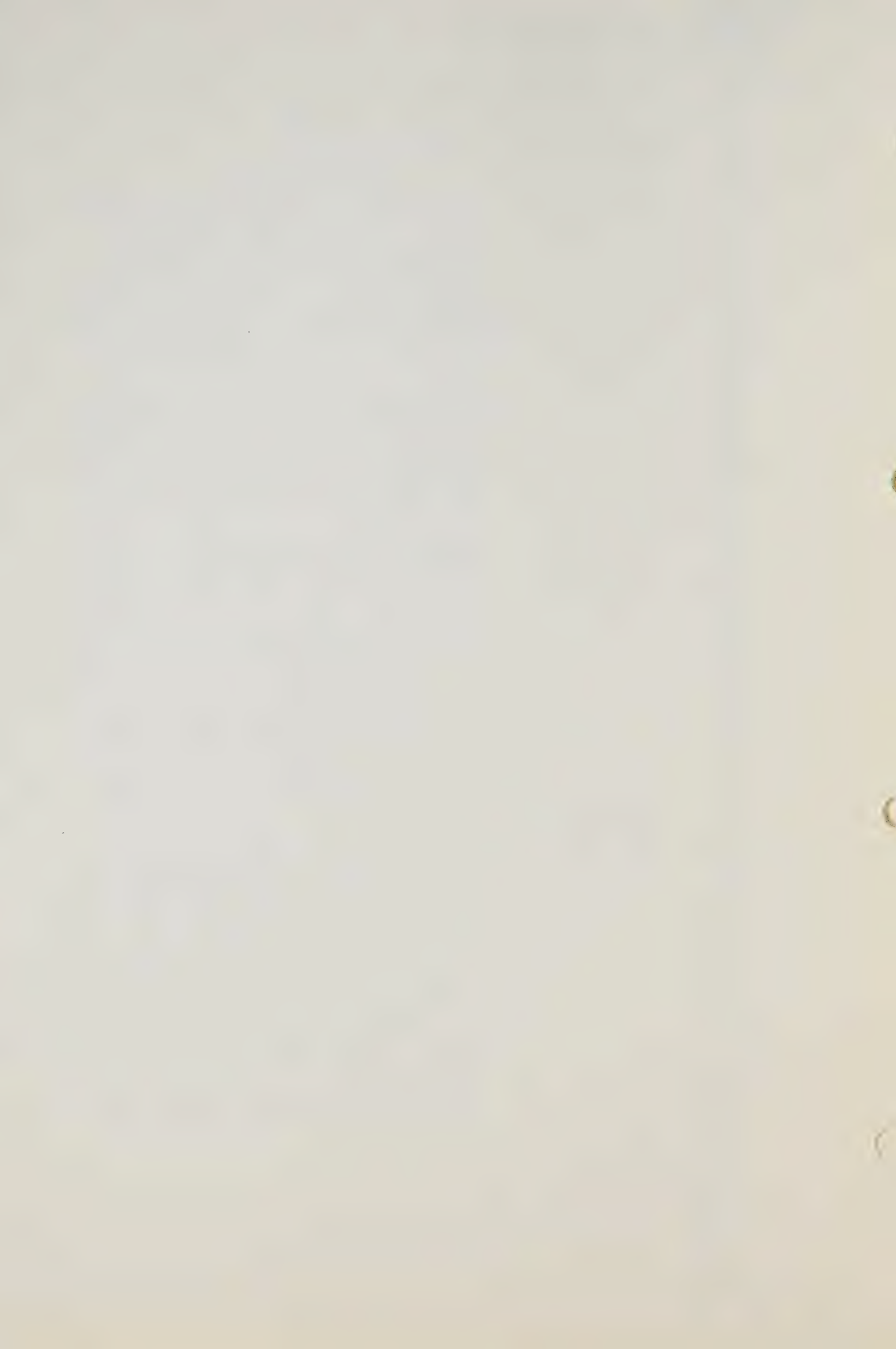
5 addressed to yourself, copies of
6 which were sent to Mr. N. A. Chalmers,
7 Mr. R. M. McLearn and Mr. S. A.

8 Kellerman, it was stated that the
9 Respondents would not be compelled by
10 the Committee to plead to the new
11 Canadian Pacific Limited's Application
12 until the expiration of 30 days
13 following the issuance of the Decision
14 on the Application for Costs arising
15 out of CPL's prior Application."
16

17 In other words the undertaking is
18 confirmed.
19

20 "As you know an important
21 element in the matter of costs has
22 now been moved into the Federal Court
23 of Canada by the Respondents and there
24 has, as yet, been no final disposition
25 on the Respondent's Application for
26 Costs.
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"The Committee nonetheless,
nonetheless has sent down for hearing
CPL's new application commencing on
November 28th, '77 ..."

May I just pause there? That was done without the
invitation to the Respondents to comment, to make
submissions, or to voice what had been their extremely
strong objections. But in any event I will continue.

"... that date being the only one
feasible in view of the hearings
scheduled for the Commissioners
involved in the hearing of this
Application.

"In order therefore that the
Application be ready for hearing on
that date, the Committee has directed
in its Notice of Hearing dated October
6th, 1977 that all persons wishing to
oppose or intervene the Application
must file written statements and
exhibits before October 31.

"Yours truly."

And then October 12th, there is a
letter which I received from my learned friend, Mr.
Chalmers. And this one is, pardon me I have got the
wrong date. No, it is October 12th, pardon me. My



1 friend Mr. Chalmers, it is addressed to the Secretary
2 of the Canadian Transport Commission. It reads as
3 follows:

4 "Dear Sir:

5 "I acknowledge receipt of
6 the Railway Transport Committee's
7 Notice of Hearing dated October 6th,
8 1977 in respect of the new Application
9 of Canadian Pacific Limited regarding
10 the Powell Sidings concerning the
11 pedestrian crossing at mileage 109.30
12 which is a subdivision of Canadian
13 Pacific Limited, and a portion of the
14 railway between mileage 108.35 and
15 109.6.
16

17 "I understand that the
18 Application will be heard as scheduled,
19 subject to renewal thereof. If this
20 is not so the Application of Canadian
21 Pacific Limited for interim operating
22 authority over the said crossing of
23 trackage is hereby withdrawn."
24

25 Then my Application dated October 17,
26 1977, the Respondents before you, Messrs. Bricker,
27 Henderson, Girard and the City of Windsor, applied
28 for adjournment of this hearing to a date 30 days
29
30



1 after a decision on the matter of costs.

2 A telegram was received from Mr.
3 d'Avignon, that's dated the 20th of October, 1977.
4 It reads as follows:

5 "Due to other commitments of
6 the Commissioners who will compose the
7 Panel in the above-mentioned Hearing,
8 the Railway Transport Committee cannot
9 comply with the request for an oral
10 hearing at Windsor on October 24th,
11 1977 or at any other date in the near
12 future to hear said Application for
13 adjournment.
14

15
16 "The Committee directs that
17 the Applicants mail or deliver written
18 briefs in support of the Application
19 in explaining or supporting the same
20 within one week of receipt of this
21 Telex to the Secretary of the Railway
22 Transport Committee and the Canadian
23 Pacific Limited which will be afforded
24 one week after receipt of Applicants'
25 documentation to submit in the same
26 manner written statements containing
27 its answers to the Application together
28 with any documents that may be useful
29
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1 in explaining or supporting the said
2 answers to the Secretary, Railway
3 Transport Committee and to the
4 Applicants in the present Application.

5 "The Applicants will have one
6 week after receipt of CPL's documen-
7 tation to mail or deliver a reply to
8 the said answers to the Secretary,
9 Railway Transport Committee and to the
10 Canadian Pacific Limited. The Committee
11 will rule on the motion based on
12 written submissions when documentation
13 completed."
14

15 Now I have been advised that no material
16 is filed in response to that directive by the Committee.
17 The request to hold a hearing in the City of Windsor,
18 counsel took the position that we will proceed with
19 the motion for prohibition.
20

21 Now curiously enough before that was
22 done there was a letter dated the 21st of October,
23 1977, of which I received a copy. It is addressed to
24 my learned friend Mr. Paroian and it is from Mr.
25 d'Avignon. The letter starts out by saying:
26

27 "This letter confirms the
28 Telex sent ..."

29 And then the Telex message is set out.
30



1 But then Mr. d'Avignon adds a very
2 curious addendum.

3 "You are reminded that the
4 Notice of Hearing dated October 6th,
5 1977 concerning the Application of
6 Canadian Pacific Limited states that
7 all parties wishing to oppose the
8 Application and all Interveners who
9 wish to intervene in order to support,
10 oppose or modify the Application must
11 file written statements together with
12 any documents that may be useful in
13 explaining or supporting the answer
14 or intervention, as the case may be
15 to the undersigned before October 31,
16 1977."

17 Isn't it curious that that admonition
18 was not in the telegram, it was not in the Telex.
19 Mr. d'Avignon, pursuant to someone's instructions for
20 some reason saw fit to admonish the Respondents that
21 they better do what they were directed to do.

22 Shortly after that it came to the
23 attention of the Respondents in this matter that the
24 Panel which had been delegated to hear or purportedly
25 to hear or to deal with, or whatever, with the
26 Application of Canadian Pacific was not to be Messrs.



1 Jones and LaBorde but was to be composed of the three
2 honourable gentlemen sitting today.

3 THE CHAIRMAN: I thought you were
4 going to say lesser lights.

5 MR. FISHER: Then the motion was
6 brought to the Federal Court immediately for order
7 for prohibition. As I said that was not successful.
8 The reasons were released, I believe, very late
9 Tuesday afternoon. The earliest I could have got
10 them was late, late Tuesday afternoon, I think it
11 was Wednesday morning. In any event I sent a
12 telegram on Wednesday to Mr. Thompson. And that
13 read as follows:
14
15

16 "This will confirm my telephone
17 conversation with you earlier this
18 morning wherein I advised that appeals
19 should be brought forthwith to the
20 attention of the Honourable Mr. Justice
21 Mahoney dated the 22nd day of November,
22 1977. I further confirm my position
23 that further proceedings by the Railway
24 Transport Committee should be stayed
25 pending appeal. If said proceedings
26 are not stayed the appeal would be
27 rendered an exercise in futility. I
28 request that I be informed of the
29
30



1 position of the Railway Transport
2 Committee as soon as possible. In
3 the event the Railway Transport
4 Committee denies this request for a
5 stay I shall have no alternative but
6 to apply to Federal Court for Order
7 of that Court to stay the proceedings
8 pending appeal. The Notice of Appeal
9 is being prepared today and will
10 hopefully be in the hands of a courier
11 service by later today."

12
13 And then the very next day I received
14 this epistle by way of a telegram:

15
16 "Re request for stay of
17 proceedings pending appeal to Mr.
18 Justice Mahoney dated November 22,
19 1977, the Railway Transport Committee
20 hereby denies said request. Signed
21 J. d'Avignon."

22 That brings us up to date. The judgment
23 of Mr. Justice Mahoney, with all respect, is under
24 appeal. That judgment, again with the greatest of
25 respect, is inconsistent with the former judgment of
26 Mr. Justice Gibson in the same court. Mr. Justice
27 Gibson has indicated that no decision, apart from the
28 application relating to costs, has been made as yet
29
30



1 by the Commission.

2 The Honourable Mr. Justice Mahoney
3 says, rather it is my view that the undertaking is
4 no longer outstanding because the decision on the
5 motion for costs has in fact been made.
6

7 Now that brings me to the point where
8 I have to ask, what is the position of the Committee
9 with respect to that motion for costs. You see, I
10 respectfully say this to you, sir, that I believe
11 that we are entitled to that information. Surely,
12 I am not cross-examining you and I have no intention
13 to be disrespectful, but surely that's information which
14 we are entitled to have. What is the position of the
15 Railway Transport Committee with respect to the motion
16 for costs? You see, because by Order Number R-25-112,
17 an Order of the Committee which to my mind, knowledge
18 rather, has not been changed. It states that a panel
19 has been unable to agree to a decision. Now I am
20 suggesting this to you, that bearing in mind the
21 statements of Mr. Justice Mahoney, that the under-
22 taking is no longer outstanding because a decision on
23 costs has been made. With the greatest of respect,
24 if the question of costs has not been decided, if
25 there is no decision then surely what one can read
26 into this judgment is that the undertaking is still
27 binding.
28
29
30



1 There was an undertaking that no
2 response would be required until 30 days expired.
3 Now my friend accuses me of endeavouring to cross-
4 examine you. For the second or third time I wish to
5 assure you, sir, that that's not my intention. But I
6 believe this information we are entitled to have.
7 And that is who decided to hear this? On what basis?
8 Why was it decided that the Application dated August
9 15 would be heard when there was an Application for
10 interim operating authority? Who made that decision
11 and under what representations?
12

13 As to this concept which Ms. Silverstone
14 advanced, that it is the position, I presume of course
15 that she was speaking for the Railway Transport
16 Committee, that individuals can make as many appli-
17 cations as they like.
18

19 I respectfully say to you, sir, that I
20 am entitled to know whether that is the policy of the
21 Committee. There are two matters presently in the
22 Federal Court of Appeal which arise out of this sorry,
23 sorry, sorry act committed by Canadian Pacific
24 Railway.
25

26 You see Canadian Pacific will have
27 people believe that they are an aggrieved party, they
28 are an injured party. They have been wounded, they
29 are entitled to something. If one strips the language
30



1 down to its true meaning what CPR is endeavouring to
2 say is that we are entitled to this. We are entitled,
3 we are going to have it, we can apply and apply and
4 apply and so on until we get it.

5 There is such a thing, surely, as an
6 abuse. If the matters are permitted to proceed
7 through the Federal Court of Appeal, then all people
8 appearing before your Committee, and with respect sir,
9 the Committee itself will have some guidance as to
10 what policy it ought to follow.
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1 I say this with the greatest of respect but isn't
2 it rather -- couldn't it be interpreted as rather
3 strong-willed to stay notwithstanding that the City
4 of Windsor and the respondents had to wait 15 months,
5 15 months of an environmental outrage and an unlawful
6 act. We cannot permit Canadian Pacific to wait. If
7 one goes back to recall how this matter came before
8 you, it was because of an unlawful act of Canadian
9 Pacific. It baffles me how a proposition could be
10 advanced to you that on the basis of an unlawful act
11 there is urgency and they must get what they want.
12
13

14 I also ask you to consider that there
15 has been no Order of the Board of which I am aware
16 altering, varying, or whatever, the ruling of Mr.
17 Jones and Mr. LaBorde whereby the application under
18 196 and 197 was adjourned sine die. What happened to
19 that? I mean, did it just die? Did it evaporate?
20 Did it go away? Is Canadian Pacific to be
21 permitted to pretend it did not happen. It is all
22 an ugly dream. Let's get on with it. Get on with
23 what?
24

25 Ignoring three years of a conflict
26 and ignoring a Judgment of the Chairman of this
27 Committee. If Canadian Pacific has any relief at all,
28 it must, of course, be found in the Statute. I
29 submit to you, sir, that there is no jurisdiction
30



F-2

1 whatsoever to entertain a second application. There
2 is none. I am anticipating my friend's comments
3 somewhat perhaps but it is not upon the City of
4 Windsor or the other respondents in this matter to
5 show that the Committee does not have jurisdiction.
6 Surely the onus is upon my friend to show that
7 there is jurisdiction of this Committee to
8 entertain what he hopes will be entertained.

9
10 Now, if reference is made to Section 63
11 of the National Transportation Act -- there is an
12 exhaustive statement of the remedies of an Applicant
13 and they are as follows:

14 "The Commission may review, rescind,
15 change, alter or vary any Order or
16 Decision made by it or may re-hear
17 any application before deciding it."

18
19 Now, if we might dissect that for a
20 moment. Let us remember in the pleadings of Mr.
21 Chalmers there is no application for a re-hearing.
22 No application for re-hearing. Indeed, there cannot
23 be. How can there be. You can only have one
24 "... before an application has been decided." It
25 is double-barreled. There is no request for
26 re-hearing and, indeed, I suggest the reason for it,
27 Mr. Chalmers knows better than to make that request.

28
29 The other relief that the Commission
30 may grant, and I wish to emphasize may grant is that



F-3

1 "The Commission may review, rescind, change, alter
2 or vary any Order or Decision".

3
4 Now, if reference is made to the
5 rules and someone -- surely it must be clear that
6 if there is to be a review, it is to be a review by
7 the people who heard the evidence. How could three
8 other men or five other men or women or whatever,
9 hope to review 2600 pages of a transcript and
10 volumes of pleadings.

11
12 My friend has one remedy and one
13 remedy only I am afraid and that is for a review.

14 Section 63 makes no reference at all
15 to the right to make a second application and I
16 submit to you very strongly, sir, that the onus is
17 not on me to show that the Committee does not have
18 jurisdiction. It is up to him to show that it does.

19
20 Those are all the comments I have for
21 the moment.

22 THE CHAIRMAN: Do other counsel wish
23 to speak on support of a motion?

24 MR. PAROIAN: We will speak in support
25 of the motion but I would like to divide my argument
26 in two parts. Mr. Dumont will address you on the
27 jurisdiction question, with your permission and, of
28 course, I would like to conclude our submissions to
29 this Honourable Board on a few of the matters that
30



F-4

1 my friend has raised.

2 MR. DUMONT: Mr. Chairman, I would
3 like to begin by enlarging somewhat on what my friend
4 Mr. Fisher, has already put before you. I would
5 draw your attention once more to the decision of
6 The Honourable Mr. Justice Mahoney of the Federal
7 Court of Canada with respect to the application for
8 prohibition based solely on the question of the
9 undertaking the CTC made to us in June which we
10 submit respectfully has not yet been complied with
11 and which I submit remains outstanding.

12
13 The Honourable Mr. Justice Mahoney
14 points out on page 4 of his Decision:

15
16 "It is my view that the undertaking
17 is no longer outstanding because a
18 Decision on the Motion for costs has
19 in fact been made."

20 I would draw your attention, Mr.
21 Chairman, to the Order of the Canadian Transport
22 Commission which was issued on July 7, 1977, being
23 Order No. R-25112:

24
25 "Whereas the panel has been unable to
26 agree to a decision in the matter of
27 the aforementioned motion for costs;
28 whereas the Railway Transport
29 Committee pursuant to Section 63 of the
30



F-5

National Transportation Act has
therefore decided to re-hear (a very
important word, Mr. Chairman, re-hear)
the said motion before a new panel
constituted for that purpose."

Let me now direct your attention to
Section 63 of the National Transportation Act under
which the Order of July 7 made by the CTC is
purported to find its foundation.

"The Commission ..."

Section 63:

"The Commission may review, rescind,
change, alter or vary any Order or
Decision made by it or my re-hear any
application before deciding it."

I submit with the greatest of respect, Mr. Chairman,
that if there was a decision made by the Commission
as founded by The Honourable Mr. Justice Mahoney,
then there is absolutely no foundation whatever for
the Order of July 7. For once there has been a
decision made. There is no jurisdiction in the
Canadian Transport Commission to order a re-hearing.
The Act is explicit. It states quite clearly:

"... may re-hear any application before
deciding it."

I submit with respect, then, that the



F-6

1 application as to costs has definitely not been
2 decided and in support of that I would call your
3 attention to the very Order I just referred to. It
4 purports to empanel a new Commission for the
5 singular purpose of deciding the question. Therefore,
6 it is not open to us today to suggest a suggestion
7 that a decision has been reached and I submit then
8 if we refer back to the decision of The Honourable
9 Mr. Justice Mahoney, there is only one conclusion we
10 can possibly come to and that is that the undertaking
11 remains outstanding and as he points out at page 4
12 of that Decision:
13
14

15 "I would be most reluctant to base
16 a decision adverse to the Applicants
17 (that is us) on a finding that the
18 undertaking could be circumvented
19 merely by bringing an application for
20 an Interim Order which if successful
21 for its term achieve both what CP
22 sought and the Applicants opposed
23 under the April 15th application."

24 I submit with respect that there is
25 absolutely no foundation. There can be no support
26 found whatever for a finding or a suggestion that
27 there has been a decision with respect to the
28 application for costs and I submit with great respect
29
30



F-7

1 that it is clear from the decision of Mr. Justice
2 Mahoney that had he not misconstrued the facts
3 prohibitions would have been granted and this
4 Committee would not be sitting in Windsor today by
5 virtue of the very undertaking that we referred to
6 of June 27, 1977.
7

8 My friend, Mr. Fisher, has alluded to
9 several points with respect to the jurisdiction of
10 this Committee. He has posed the question respectfully
11 what is the jurisdiction of this Committee and I
12 would like to address several comments to that.
13

14 However, before I do so I would like
15 to make a preliminary observation, the first of
16 which is that this Committee is in Windsor today not
17 because of anything that the citizens of Windsor
18 is purported to do but rather because of an
19 application brought on by CP Limited, an application
20 which by its very terms is styled "a fresh
21 application".
22

23 I would also like to suggest, Mr.
24 Chairman, that the duty of the Commission today
25 sitting in Windsor is not merely that of an
26 administrative Tribunal. I would remind you, sir,
27 as I am sure you are no doubt aware that your function
28 today is much more onerous than that. It may in a
29 word be termed to be called a judicial function and
30



F-8

1 because it is a judicial function and because it is
2 judicial by virtue of the fact that the rights of
3 the individuals are being affected by what you may or
4 may not do today we will refer to the rights of the
5 individuals, Mr. Chairman. I am not restricting
6 that to the individuals who are seated behind me,
7 the citizens of Windsor, but I also refer to the
8 Corporate individual that is involved in this
9 application, CP Limited, for clearly its rights may
10 well be affected by your decisions today because
11 this is a judicial hearing, Mr. Chairman.
12
13

14 I would submit with the greatest of
15 respect that you ought not to sit with any
16 preconceived ideas as to your jurisdiction. Your
17 jurisdiction is being openly challenged today and I
18 submit to you with respect and I will show you, I
19 think very clearly that you are totally without
20 jurisdiction with respect to the application which
21 has been placed before you today.
22

23 The jurisdiction of this Committee,
24 Mr. Chairman, is to be found at Section 63 of the
25 National Transportation Act.

26 "The Commission may review, rescind,
27 change, alter or vary any Order or
28 Decision made by it."
29

30 Stopping there, Mr. Chairman, a



F-9

1 Decision under Section 216 of the Railway Act has
2 already been made. Messrs. Jones and LaBorde have
3 decided that the application under Section 216 is
4 not granted. It fails. Section 216 also vests the
5 Railway Transport Committee of the Canadian
6 Transport Commission with jurisdiction to re-hear
7 any application before deciding it. The application,
8 Mr. Chairman, under 216 has already been decided
9 and therefore I submit with respect there is no
10 jurisdiction at all to re-hear that application.
11
12

13 Now, as Mr. Fisher pointed out, our
14 learned friend Mr. Chalmers has not seen fit to
15 style his application as an application for a
16 re-hearing but while I am making reference to that
17 application, Mr. Chairman, I would point out to you
18 and your Committee that Mr. Chalmers has very
19 astutely recognized the difficulty; he may well have
20 with respect to bringing a fresh application and I
21 submit his application contemplates that very
22 difficulty.
23

24 If I might direct your attention, sir,
25 to page 2 of the application, more specifically
26 paragraph four. If I might quote from paragraph four,
27 Mr. Chairman:
28

29 "Canadian Pacific Limited further
30 and in the alternative applies to the



F-10

1 Commission to review, rescind, change,
2 alter and vary the Decision of its
3 Railway Transport Committee made on
4 the 5th day of April, 1977."

5 And, I will stop at that point. I do not think that
6 the remainder of that paragraph is germane to what
7 I have to say.
8

9 As I said, Mr. Chalmers seems to have
10 contemplated the argument that there is no
11 jurisdiction in the Canadian Transport Commission to
12 entertain a fresh application.

13 As I have pointed out, Mr. Chairman,
14 the jurisdiction in this case is to be found in
15 Section 63 of the Statute and it is trite law that
16 an administrative Tribunal has only that jurisdiction
17 which is given to it by this Statute that creates it.

18 Section 63 certainly makes no mention
19 of a fresh application as Mr. Fisher pointed out and
20 rightly so. I submit with respect the only remedy
21 available to CP now is to bring on an application for
22 a review and I submit, Mr. Chairman, that the only
23 way the application which is before you today can be
24 viewed by you is that it must necessarily be a review.
25 It is an application for a review. There is no
26 jurisdiction in this Committee to listen to any fresh
27 applications, to give the Statute an interpretation
28
29
30



F-11

1 which would enable an individual, CP or otherwise,
2 to come before you and to make one fresh application
3 after another would be to give the Statute an
4 interpretation which is not only illogical and
5 arbitrary but totally without any foundation whatever.
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Statutes ought not to be interpreted so as to give them a ridiculous meaning. I submit with respect that if one were to interpret the National Transportation Act as enabling an Applicant to come before it time and time and time and time again with a fresh application then that would be to give the Statute an interpretation which is clearly ridiculous.

As a matter of fact I submit, Mr. Chairman, that Parliament has anticipated this type of situation and they are provided in Section 63 the remedy and I submit, with respect, the only remedy that is available to see in this particular instance and that is to apply for a review.

That being the situation where does that leave this Committee? If this is in fact a review (and I submit with respect that it can only be an application for a review) then this Committee has obviously no jurisdiction at all because what is sought to be reviewed here is an application which has already been decided by Messrs. Jones and LaBorde. It's not a fresh application. You cannot review a fresh application. You must necessarily review the application which has already been before the Committee.

Messrs. Jones and LaBorde are seized



G-2

1 of that application. There is no jurisdiction for a
2 new panel of the Canadian Transport Committee to
3 entertain a review of the application because if
4 there were, Mr. Chairman, it would no longer be in
5 the nature of a review but would rather be in the
6 nature of an appeal and this is clearly not an
7 appeal.
8

9 Section 64 of the National
10 Transportation Act provides what appeals may be made
11 and it is certainly not an appeal to this Committee.

12 THE CHAIRMAN: Excuse me for
13 interrupting you, Mr. Dumont, but are you suggesting
14 that all of the decisions of the Review Committee of
15 the Canadian Transport Commission are invalid?
16

17 MR. DUMONT: I am not suggesting that
18 at all, Mr. Chairman.

19 THE CHAIRMAN: Well it seems to me
20 that that is road that your argument is leading us to?

21 MR. DUMONT: If in fact --

22 THE CHAIRMAN: The Review Committee --
23 if I could just elaborate on my question -- the
24 Review Committee normally hears reviews of Decisions
25 of panels of the modes Committees. It's a special
26 Committee set up for that purpose.
27

28 MR. DUMONT: I am well familiar with
29 that Committee, Mr. Chairman. As a matter of fact I
30 wonder if I might direct you to, I think it is,



G-3

1 Rule 770 of the Canadian Transport Commission which
2 provides for a Review Committee and it would be my
3 submission that the Review Committee has no function
4 in this particular case and that is why the review
5 has been brought on -- not to the Review Committee
6 but to this Committee.

7
8 I am not challenging the right, Mr.
9 Chairman, of CP to seek review. I am prepared to
10 accept that they have a right to seek a review and
11 I would even go so far as to say that they probably
12 have a right to seek as many reviews as they choose
13 to seek.

14
15 What I am telling you, sir, is that
16 there is no jurisdiction to be found in the
17 National Transportation Act which enables you three
18 gentlemen to listen to the review.

19
20 The only gentleman who can review the
21 Decision which has already been made under Section 216
22 are Messrs. Jones and LaBorde because the Decision
23 that is to be reviewed flows from the original
24 application.

25
26 As I said earlier you cannot review
27 something that has not already been heard. They are
28 seized of that duty and therefore this Commission
29 as empanelled today is without jurisdiction. Once
30 more I reiterate. There is no jurisdiction in the



G-4

1 Canadian Transport Commission to hear a fresh
2 application. There is only jurisdiction to hear an
3 application for a review or, if you wish, to bring it
4 entirely within Section 63 of the National
5 Transportation Act. You may hear an application for
6 review, rescission, change, alteration or variation of
7 any order but those functions are necessarily limited
8 to the panel which was seized of the original problems
9 because that is where the Application must necessarily
10 flow. There is no jurisdiction as I said, to hear a
11 new application.
12
13

14 You can review the old application.
15 To give the Statute any other interpretation
16 necessarily results in a very unusual situation.
17 Specifically one where an Applicant can just keep
18 coming back until finally there is no one there to
19 say anything except yes, go ahead for Heaven's sake,
20 so we don't have to listen to you again.
21

22 THE CHAIRMAN: But, Mr. Dumont, if
23 you were representing a client who made an application
24 to one of the Committees and the application was
25 heard at a public hearing and the Committee that
26 heard the public hearing decided on all points very
27 fairly and vehemently against your clients, would
28 you like to have the review heard by the same people?
29

30 MR. DUMONT: I don't think it is a



G-5

1 question of my personal preferences, Mr. Chairman.
2 It's a question of what the Statute permits . In
3 this case that is the only thing, in my submission,
4 that the Statute permits.

5 THE CHAIRMAN: Do you think it would be
6 just to have the same people?

7 MR. DUMONT: Yes, I do. I would point
8 out to you, I would point out to you very strongly
9 at this point in time that we did nothing -- the
10 people of Windsor did absolutely nothing to conclude
11 the last hearing.
12

13 The last hearing was concluded, Mr.
14 Chairman, when CP, through its counsel, sought to
15 close its case and in fact, did close its case.
16

17 Now we are faced with a situation
18 where they say oh, but we have a lot more information
19 and evidence that should have been heard the last
20 time. Well I say to them in reply, why did you
21 close your case if you had all that evidence? If it
22 was so germane and so pertinent why didn't you
23 present it?
24

25 There is no jurisdiction, Mr. Chairman,
26 for this Committee to hear a fresh application,
27 therefore, I submit that the only jurisdiction in
28 the Canadian Transport Commission is that which is
29 contemplated by paragraph 4 of CP Limited application.
30



G-6

1 That is for review and because that's the situation
2 this Committee as empanelled is without jurisdiction.

3 THE CHAIRMAN: Will you be much
4 longer, Mr. Dumont?

5 MR. DUMONT: I believe my comments
6 are just about concluded, Mr. Chairman.

7 THE CHAIRMAN: We normally break
8 at 11:30 but I think you might as well finish and
9 then we will have a break.
10

11 MR. DUMONT: I think subject to anything
12 that I may conclude in the break, Mr. Chairman, my
13 comments on the question of jurisdiction have
14 concluded.
15

16 THE CHAIRMAN: Fine, thank you. We
17 will have a ten minute break.

18 --- SHORT RECESS.

19 --- ON RESUMING.

20 THE HEARING PROCESS OFFICER: Order,
21 please. Everyone please rise.

22 THE CHAIRMAN: Please be seated.

23 Well, Mr. Dumont, did you think up
24 some further points to your argument?
25

26 MR. DUMONT: No, Mr. Chairman.
27 Unfortunately I didn't think of any further argument
28 but I would like to reply to one question you put
29 to me, the question of being if I were representing
30 a client and I got a decision that was unfavourable



G-7

1 would I want the review to be head by the same
2 panel that had already decided against me.

3 I pointed out in my original answer
4 that I didn't think it was a matter of personal
5 preference and I still don't. It is a matter of
6 jurisdiction which is vested in the Committee by
7 the Act.
8

9 However, I would point out that if
10 the review were in fact to be heard by someone other
11 than Messrs Jones and LaBorde in this case, then it
12 would not be a review at all. It would be an appeal
13 and therefore, I submit even more strongly, that
14 there can be no review by anyone other than Messrs.
15 Jones and LaBorde.
16

17 THE CHAIRMAN: Thank you. The reason
18 I asked the question was based on the Commission's
19 not only policy but practice of having reviews
20 heard by a Review Committee which is composed of the
21 Chairman of the various modal Committees and the
22 practice is to make sure that the people hearing
23 the review are never the people who heard the
24 actual application and I was wondering if we were
25 wrong in that respect and all of the decisions of
26 the Review Committee have been incorrect. You don't
27 need to address the matter any further.
28
29
30

MR. DUMONT: Well, then Mr



G-8

1 Chairman, I would like to accept your challenge
2 because I think I can answer it quite handily.

3 If I may direct you to Section 24,
4 Subsection 1 of the National Transportation Act.---

5 THE CHAIRMAN: We are always glad to
6 get advice when we can.

7 MR. DUMONT: If I may just have your
8 indulgence for a moment, Mr. Chairman.

9 Mr. Chairman, if I might make
10 reference to the general rules of the National
11 Transportation Act as I had them, effective the 20th
12 of September, 1967, Rule 200 which is headed up
13 Committees of the Commission, the following Committees
14 are established and then it sets out some seven or
15 eight -- eight I guess it is, Committees, one of
16 which is the Review Committee being Rule 200, Sub-
17 paragraph (F).

18 THE CHAIRMAN: Yes. I have that.

19 MR. DUMONT: Now if I may draw your
20 attention, Mr. Chairman, to Rule 260:

21 "Unless otherwise directed by the
22 Commission and subject to Subsection 2
23 of this Rule, each Committee shall
24 perform all the functions of the
25 Commission under the enactments herein
26 mentioned after its name."
27
28
29
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G-9

1 Now if we go down to the enactments
2 which are listed under Subparagraph (G) which is
3 entitled Review Committee, it provides:

4 "That the Review Committee shall
5 exercise those functions under
6 Section 24, Subsection 4 of the
7 National Transportation Act."
8

9 Now if we make reference following
10 through to Section 24, Subsection 4, and I will
11 quote it,

12 "If the Commission, after a hearing,
13 finds that the Act, omission or
14 rate in respect of which the appeal
15 is made is prejudicial to the public
16 interest, the Commission may ---"

17
18 I am sorry. I am reading the wrong section. That
19 is Section 23.

20 THE CHAIRMAN: I couldn't find it.

21 MR. DUMONT: Okay. Section 24, 4.

22 "Where an Order, Rule or Direction
23 made by a Committee of the Commission
24 in respect of a matter related to a
25 particular mode of transport, not
26 being a matter of a specific rate,
27 license or certificate, is objected to
28 by an operator of another mode of
29
30



G-10

1 transport on the ground that the Order,
2 Rule or Direction discriminates
3 against or is otherwise unfair to its
4 operations, the Commission shall
5 otherwise then by the Committee of
6 the Commission review the Order,
7 Rule or Direction in accordance with
8 such rules of procedures as the
9 Commission might prescribe therefore
10 and shall confirm, rescind, change,
11 alter, or vary the Order, Direction
12 or re-hear the matter thereof."

13
14
15 Now, Mr. Chairman, I submit that the
16 jurisdiction of the rules of the Committee is
17 confined to the operation of Section 24, Subsection 4
18 of the National Transportation Act and I think it is
19 clear on its face that this is not an application
20 that comes within that section.

21
22 THE CHAIRMAN: I understand your
23 argument. Okay. Thank you.

24 MR. DUMONT: Thank you.

25 THE CHAIRMAN: Mr. Paroian?

26
27 MR. PAROIAN: I will stay away from
28 the legal arguments and I will not use the microphones
29 because ordinarily it is not necessary. I hope
30 everyone at the back can hear me.



G-11

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We are here asking today at the opening for two things and I will add to it a third.

The first is an adjournment or -- pardon me. The first is that a declaration by this Committee that it has no jurisdiction to entertain the applications such as they may be that Canadian Pacific Limited has brought on.

My friends have argued very eloquently in support of that position and I submit that it is accurate and correct and should be adopted by the Committee.

In the alternative and only in the alternative we are asking for an adjournment pending the outcome of the appeal from the Federal Court to the Federal Court of Appeal which I understand the three of you canvassed by telephone have rejected so that in essence we are asking you to reconsider your rejection on the evidence and on the representations being made here today.

I have never had to argue, in my career at the Bar, that when a matter is under appeal, particularly one that is dealing with the jurisdiction of the very administrative Tribunal which is purporting to hear the matter, I have never had to argue for an adjournment and I have never



G-12

1 obviously had one rejected nor can I, in my limited
2 career, ever find one that had been and I am
3 extremely hard pressed to imagine the reasons why
4 you would and can find no rational, compelling,
5 logical, legal or other reasons why you are here
6 today and why you would not have, on receipt of the
7 appeal and on receipt of Mr. Fisher's correspondence
8 and telecommunications, have not said the matter
9 shall stand ajourned until adjudication by a
10 further Court.
11

12 My friend has argued -- my friend
13 Mr. Fisher has argued eloquently and logically and
14 in a compelling fashion that the appeal is certainly
15 not frivolous and as obvious to you as a lawyer of
16 note.
17

18 Why then would you not grant this
19 adjournment?
20

21 There can only be one reason and that
22 was as expressed to me by Mr. Scott in our telephone
23 communication which I confirmed by letter of July
24 the 12th, 1977 and that is that it is not in the
25 CPR's interest and that frankly, gentlemen, I find
26 offensive.
27

28

29

30

31



H.1
NG/ko

1 And that frankly gentlemen I find offensive. Do not take
2 my loud voice as trying to be intimidating or any-
3 thing else, it is just that I do not like those PA
4 systems.

5 THE CHAIRMAN: We do not find it
6 intimidating in any case.

7 MR. PAROIAN: I did not think you
8 would. I would not think that this Committee would
9 find anybody intimidating from the people's side of
10 the fence. Let me get a little stronger about that.

11 I am little hard pressed to understand
12 what this Committee has been doing since June of this
13 year, when they have given their word and abridged it
14 arbitrarily and unilaterally. There will be no
15 necessity to file any reply until 30 days after the
16 question for costs has been decided. And when the
17 question was challenged in the courts, and only after
18 the appeal, do we find that something new, some new
19 urgency has come about. The adjournment was granted
20 sine die automatically. Here we are now with this new
21 Application or Review, Application for Review or
22 whatever it is that CP has before you today being
23 moved along with unseemly haste so that these people
24 in fact are saying to themselves, I am sure, why?
25 What is happening? What caused the situation to change?

26 For 15 months we could not get a reply
27
28
29
30



H 2

1 from your Committee, albeit that Kellerman wrote,
2 that Fisher wrote, that Paroian wrote and people wrote,
3 we could not get so much as a "hello, how are you".

4 And then you see something else
5 happened, that nobody here has told you about but I
6 will. I applied on behalf of Robert Girard for
7 permission to prosecute CP for using those tracks
8 unlawfully. But by the time the application got to
9 be heard six months had passed by, and as we all know
10 the limitation period under the Criminal Code, under
11 Part 24 is six months. And so they went free again.

12 There was an instance of urgency, but
13 nothing could be done to move you. When I say you I
14 mean your Committee. CP continued to operate
15 unfettered. And for 15 months they continued to
16 operate, no sense of urgency on anybody.

17 When we started again we got another
18 undertaking, Mr. Chairman. We got an undertaking
19 from the then Chairman of the Board, Mr. Jones, that
20 before the commencement of the next adjourned
21 hearings he would give us an answer as to our motion
22 on costs. We did not get that.

23 He then gave us an undertaking that
24 before the conclusion of the hearing we would have,
25 and those are the words he used, undertaking. And
26 between you and me as lawyers, and Mr. Jones is a
27
28
29
30



H 3

1 lawyer of some report, import, that word means some-
2 thing. It means something very substantial. That
3 did not happen and I do not blame Mr. Jones for that.
4 He had another member that he had to get a unanimous
5 decision from, he felt one way or another. We do not
6 know why they could not decide or what happened, we
7 did not get that decision.
8

9 And we were told without an undertaking
10 that they would take the decision away and give us a
11 decision. And that did not happen. But no great
12 sense of urgency, these people have only been fighting
13 for three years without any money, one of the largest
14 pools of wealth in the world. But no urgency
15 created in the CTC, they are only the public I guess
16 is what you must have been saying.
17

18 But now we are here before you with a
19 very important matter going to the Federal Court of
20 Appeal, a matter that's never been tested before that
21 I know of. And we ask you for an adjournment, which
22 we should not have even had to have asked, I would
23 have thought, and we were denied it. And I ask myself
24 why.
25

26 And I submit to you that in the
27 Decision that you give today granting or denying the
28 adjournment you should tell us why, in clear
29 unequivocal terms you should tell us not only why no
30



H 4

1 adjournment but you should tell us why this sudden
2 dramatic change from July of this year to the present,
3 this great sense of urgency that has come to this
4 hearing so suddenly. Whereas before that 15 months
5 was not too bad.

6 So the people had the trains going then,
7 so that the CPR operated for something in the order in
8 excess of three years, two and a half years.

9
10 THE CHAIRMAN: Mr. Paroian are you
11 suggesting bad faith on the part of the Panel?

12 MR. PAROIAN: I could argue that.

13 THE CHAIRMAN: If you are suggesting
14 that I suggest that you put it on the record straight
15 out.

16
17 MR. PAROIAN: The third motion that I
18 am going to bring on relying on the case of Regina
19 Ex Parte Moore, reported in 1969 Volume 2 of the
20 Ontario Reports at page 677.

21 THE CHAIRMAN: What is the citation
22 again?

23
24 MR. PAROIAN: I'm sorry, Regina
25 against Moore Ex Parte Brooks et al. It is reported
26 in the Ontario Reports 1969, Volume 2 at page 677.

27 THE CHAIRMAN: Six hundred and --

28 MR. PAROIAN: 77, sir.

29 THE CHAIRMAN: Thank you.
30



H 5

1 MR. PAROIAN: In that instance Moore
2 was His Honour Judge Garth M. Moore, the County Court
3 Judge who also, as they were permitted to in Ontario
4 in those days, sat on a police commission.

5
6 The issue revolved about his appoint-
7 ment by the Attorney General pursuant to the Attorney
8 General's powers granted under the Police Act to
9 appoint an arbitrator when there was an interest
10 dispute between police officers of the community and
11 their employer.

12
13 The Attorney General appointed His
14 Honour to arbitrate as the chairman in arbitration
15 a matter involving a police department of which he had
16 no immediate interest nor was he involved in any way
17 whatever. In other words he was not a commissioner
18 on the police commission employer in this instance.
19 He was the commissioner in Hamilton and the dispute
20 involved, I believe it was Mississauga or Port Credit
21 as it then was.

22
23 THE CHAIRMAN: He was on the
24 Mississauga Police Commission?

25 MR. PAROIAN: No, he was on the
26 Hamilton Police Commission and this was a matter
27 involving the Mississauga Police Commission, I think
28 it was Port Credit as it then was. I am sorry, he was
29

30



H 6

1 in the Township of Vaughan.

2 In that case the police officers took
3 the position that there might be, that there might be
4 an appearance of bias on behalf of Judge Moore. The
5 court held there was no actual bias, there was no
6 evidence of actual bias, but held nevertheless he
7 ought not to sit.
8

9 So if I may read from the headnote and
10 I will read from the cases.

11 "Under Section 28(3) of the
12 Police Act the Attorney General may,
13 where there are two members of a
14 Board of Arbitration appointed by the
15 parties fail to agree on a third
16 member, appoint the third member.
17 Where the Attorney General because
18 the member is appointed by a member
19 of the Commissioners of Police and
20 the Police Association cannot agree,
21 appoints a judge who is a member of
22 several other Boards and Police
23 Commissions, the Police Association
24 may validly object to the appointment
25 on the grounds of bias. Actual bias
26 need not be proved under the
27 circumstances. If a real apprehension
28
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H 7

1 be raised in the mind of a reasonable
2 and intelligent man fully apprised of
3 the circumstances, the appointment
4 should be set aside.

5 "Since the Board of
6 Commissioners of Police must bargain
7 collectively as employer with the
8 Police as employees under Section 27
9 of the Police Act, a member of such
10 a Board could not be considered
11 completely impartial."
12

13 Mr. Chairman, the test of bias set out
14 in this case does not have to be actual bias. A real
15 apprehension may only be raised in the mind of a
16 "reasonable and intelligent man fully apprised of
17 the circumstances".
18

19 And, of course, the foundation, Mr.
20 Chairman and gentlemen of the Board, is that trite
21 old expression that not only must justice be done but
22 it must manifestly appear to be done. And on those
23 facts, on the facts before us, would a reasonably
24 intelligent person or "reasonable and intelligent
25 person" look at the facts that Mr. Fisher has so
26 carefully outlined to you and conclude then, just as
27 you said to my friend Mr. Dumont, would you not want
28 another panel to hear the decision that was dismissed,
29
30



H 8

1 a more favourable one. Is that what CPR can do, keep
2 going until they get a more favourable one? Is it
3 this one? Is it the next one? CPR cannot go shopping
4 for its tribunal.

5 It had a tribunal and it still has a
6 tribunal and that tribunal is Jones and LaBorde. And
7 any attempt to move away from that is a bias against
8 them, with the greatest of respect Mr. Chairman,
9 against us. An unconscious bias, if you will, but a
10 bias nevertheless. And the bias need not be conscious.
11 The bias can be an unconscious bias or sub-conscious
12 bias.
13

14 Your comment this morning at opening,
15 Mr. Chairman, gave me some concern. There was a pre-
16 disposition in what you said to Mr. Conen, that this
17 Application would be heard. And I would have thought
18 that the jurisdictional question would certainly have
19 been dealt with first, that you had been sent here
20 to hear it and hear it you would; notwithstanding the
21 Federal Court of Appeal Application, as I understood
22 you to say.
23

24 THE CHAIRMAN: Mr. Paroian, I do not
25 think I am going to let that comment go unchallenged.
26 In my opening remarks I said that we were going to
27 hold these hearings and we were going to hear it.
28 That is, of course, subject to any motions that may
29
30



H 9

1 be made and the disposition of those motions. We are
2 in no different position than any judge who comes for
3 a trial and starts his trial. He is there to hear
4 the evidence, he is there to proceed with the trial.

5 MR. PAROIAN: Perhaps that was an
6 unfortunate choice of words, perhaps I misintepreted
7 you. But in view of the backdrop the request for
8 adjournment which was summarily dismissed, with that
9 backdrop your comments take on a different view.

10 THE CHAIRMAN: I don't think, Mr.
11 Paroian, I am going to let that one go by either.
12 Because so far as I am concerned there was an
13 application made for an adjournment of the hearing
14 here in Windsor which could not be held because of
15 other commitments.

16 But an opportunity was given to make
17 all the representations that have been made this
18 morning, the opportunity was given to make them in
19 writing. That opportunity was not taken advantage of.

20 Even the further application that was
21 made last week was not made with the type of support
22 for it that's being made this morning. So you know,
23 I think that you are being heard this morning and you
24 are being given your chance. But you were given a
25 chance earlier on.

26 MR. PAROIAN: That was before we went
27 to the Federal Court, I would agree with that.
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THE CHAIRMAN: Well, you have been in the Federal Court on one thing or another since spring, I believe.

MR. PAROIAN: No, not "on one thing or another". We have been to the Federal Court twice. Each time challenging the jurisdiction of this particular -- of the Commission.

THE CHAIRMAN: Well, I believe --

MR. PAROIAN: Once on the question of costs. Once on the question of whether this Tribunal ---

THE CHAIRMAN: Well, all right.

MR. PAROIAN: --- can proceed.

THE CHAIRMAN: Well, please let's not quibble about numbers. As I understand ---

MR. PAROIAN: I think it is very important because ---

THE CHAIRMAN: Well ---

MR. PAROIAN: --- because you seem to be displaying a pre-disposition to accepting ---

THE CHAIRMAN: May I have the opportunity to speak? As I understand it an application was made to the Trial Division of the Federal Court on the question of costs and then there was an appeal and another application was made for a stay of this hearing and a decision was made on that



I2

1 and there is an appeal outstanding.

2 Is that correct?

3 MR. PAROIAN: That is correct.

4 THE CHAIRMAN: Okay, fine.

5 MR. PAROIAN: The point that I am
6 making again, Mr. Chairman, is that your comment,
7 you see, can be misinterpreted. You say: "You have
8 been before the Federal Court for one thing or
9 another since spring." You know, I -- if I were a
10 little bit sensitive and I have got a thick hide but
11 I, you know, I am a little sensitive too. I start
12 thinking, well, does he figure we have been down
13 there playing games because we have not been!

14 THE CHAIRMAN: Well, if that was the
15 inference that you took from what I said, Mr.
16 Paroian, I must say you are mistaken but don't let
17 me interrupt your argument any further. Go ahead.

18 MR. PAROIAN: Of course our argument
19 before the Federal Court is for prohibition based on
20 a legal argument and not for an adjournment of
21 course.

22 THE CHAIRMAN: I might also add I am
23 not totally familiar with what took place in the
24 Courts because I was not involved myself.

25 MR. PAROIAN: I appreciate that.

26 THE CHAIRMAN: Nor were my colleagues.

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MR. PAROIAN: Our concern and I

recommend the reading of this case and I am sorry I
did not have a photostat for you but I will undertake
to obtain one for you before the afternoon is over.

THE CHAIRMAN: This is Mr. Justice
Mahoney's ---

MR. PAROIAN: No. It is the Moore
case.

THE CHAIRMAN: Oh, the Moore case,
yes.

MR. PAROIAN: I think that if you --
rather than boring you with all the statements that
are there ---

THE CHAIRMAN: I must say that at the
moment I do not see much similarity between the
circumstances in the two situations but I would
appreciate being able to read the case.

MR. PAROIAN: I think that it probably
would be of help, of assistance to you..

THE CHAIRMAN: Well, if you could
appreciate it -- if you could provide it I would
appreciate it very much..

MR. PAROIAN: We will undertake to
get it for you hopefully by this afternoon, over the
noon break if we can get a xerox machine that is
nearby we will obtain a copy for you.



I-4

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THE CHAIRMAN: Well, perhaps if we could just borrow your -- if that is impossible, if we could borrow your volume to aid our digestion during lunch.

MR. PAROIAN: Certainly we would be more than pleased to supply that to you.

The question in that case - the rationale of that case can be applied here. If a person has a real apprehension of bias first he has to believe there is a possibility, a real possibility even though it is a subconscious bias, not actual bias, then the Committee should stand down.

And, you have got to ask yourselves whether there is any possibility, possibility not probability, possibility of a subconscious bias in the minds of any of you or all of you and with the greatest of respect you have got to ask yourself that same question with regards to your Committee, particularly in view of the facts that have come out that have developed over the last three years.

These people look at themselves and say: How can we as successfully sought the CPR for all this time but sought them in a legal and in an appropriate -- within the framework of the



I-4

1 rule of law basis. There have never been any
2 picket signs or anything else around. It was done
3 always within the rule of law.

4 How can we have been required to
5 exercise great patience while the law was being
6 breached! How can we as law abiding citizens who
7 have not breached the law but watched the CPR do it
8 suddenly find a great sense of urgency for these
9 lawbreakers! And, that is what they are, lawbreakers!

10 It took two and a half years of
11 hearings by this Commission to bring them to stop
12 and they are going to be rewarded with expedition.
13 Now, those folks out there are going to ask the
14 question: Why! That is where the Regina ex parte
15 Moore applies.

16 Mr. Chalmers should be very familiar
17 with the Moore case. My friends point out to me the
18 argued on behalf of the Attorney-General of Canada
19 unsuccessfully. He dealt with a different point
20 altogether. In fairness, there were two points.

21 MR. CHALMERS: Section 96 Judgments.

22 MR. PAROIAN: That was the one point.

23 MR. CHALMERS: You are not saying
24 these are Section 96 Judgments?

25 MR. PAROIAN: I am not saying these
26 are Section 96 Judgments. I can see that, Mr. Chalmers.



I-6

1 MR. CHALMERS: Okay.

2 MR. PAROIAN: I mean, we lawyers,
3 I mean, it takes us a while to catch on but we get
4 the books and we read a little bit and we get a
5 copy of this and it isn't very long before we catch
6 on a little bit too.
7

8 I am sure they asked themselves after
9 having heard Mr. Fisher read out the last telegram
10 where it says: "The Railway Transport Committee
11 hereby denies such requests." I submit to you that
12 somebody is going to have to say who on the
13 Railway Transport Committee denies that request and
14 why and in addition, you said earlier - "It was not
15 your undertaking that we would not have to plead
16 until 30 days after the costs but with the greatest
17 of respect it was your Committee's undertaking
18 because Mr. Thompson --
19

20 THE CHAIRMAN: Mr. Paroian, perhaps
21 I should not let that go unpassed. You keep
22 referring to the Rail Transport Committee as my
23 Committee. I am a Commissioner on that Committee
24 but it might be misunderstood, I am Chairman of the
25 Water Transport Committee in addition and that is
26 my Committee. If you're talking about the panel's
27 Committee we are representing the Rail Committee
28 but that is not my Committee.
29
30



I-7

1 MR. PAROIAN: I would not blame you
2 one bit for backing away, sir. I think it is
3 probably the wisest move you could have made today
4 but in any event, the Railway Transport Committee ---

5 THE CHAIRMAN: I have enough sins on
6 my own Committee.

7
8 MR. CONEN: Well, shouldn't the
9 Rail Transport Committee be hearing this case then?

10 THE CHAIRMAN: We are representing
11 the Rail Transport Committee.

12 MR. CONEN: Why?

13 THE CHAIRMAN: We are the Railway
14 Transport Committee.

15
16 MR. PAROIAN: The letter that my
17 friend Mr. Fisher referred to you -- referred to
18 on June 27, 1977 ---

19 THE CHAIRMAN: What was that date
20 again, I'm sorry?

21
22 MR. PAROIAN: June 27, 1977..from Mr.
23 Keith Thompson to our law firm,my own law firm and
24 it is written to my attention:

25 "Dear Sirs:

26 I have been asked by the Railway
27 Transport Committee to advise you
28 that the respondents will not be
29 compelled by the Committee to plead
30



I-8

1 to the new Canadian Pacific Limited
2 application until the expiration of
3 30 days following the issuance of
4 the Decision on the Application for
5 Costs which arose out of the recently
6 concluded hearing in Windsor."

7 So, it was not Mr. Thompson undertaking;
8

9 it was the Railway Transport Committee's undertaking.

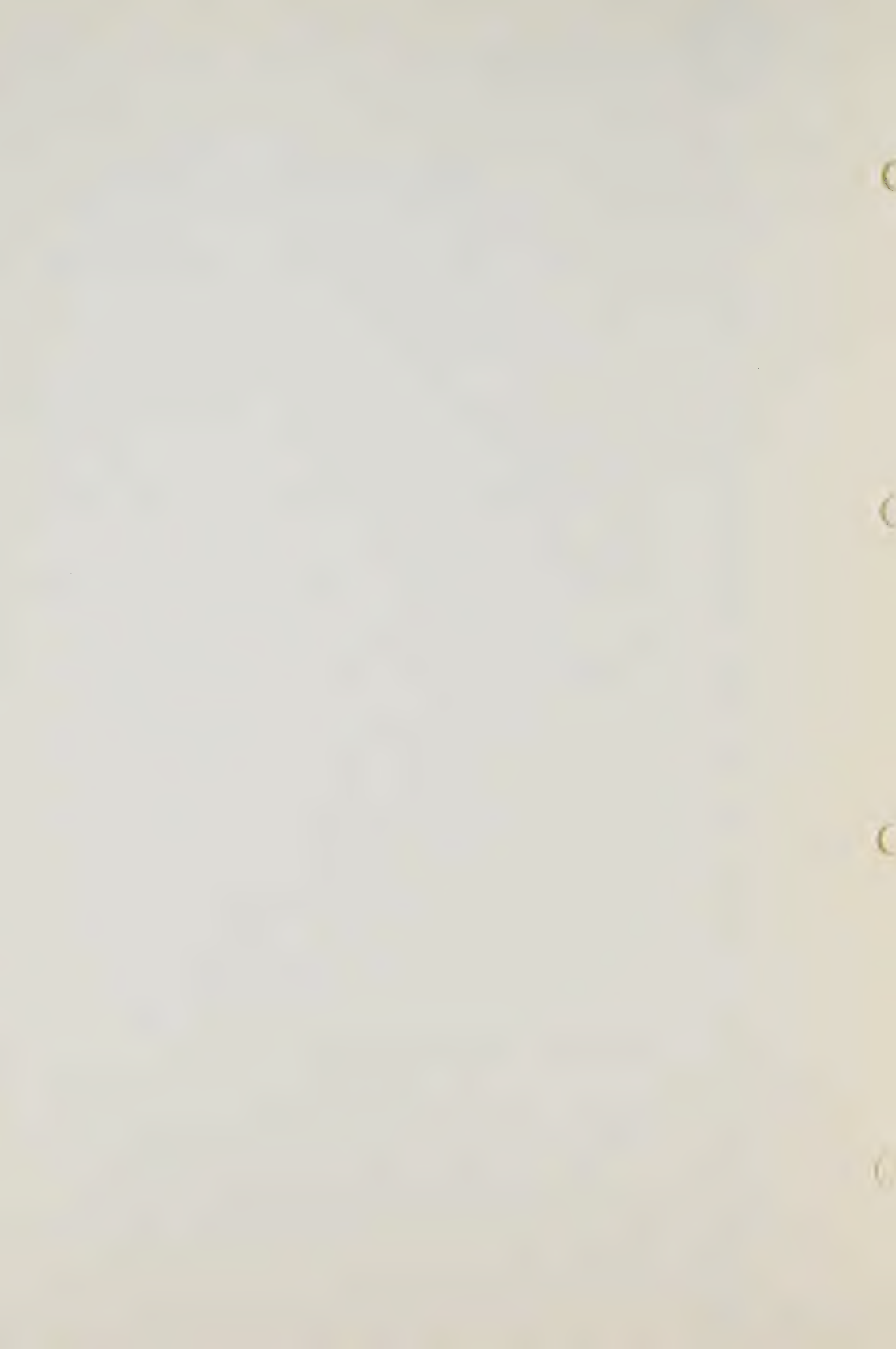
10 The very Railway Transport Committee that is here
11 today! And, it unilaterally reached it or if you
12 want to say, it politely just changed it unilaterally.

13 Now, these folks and I say, why? Why would they
14 unilaterally breach an undertaking or change it!

15 And from thereon in make no error this matter has
16 been slated to proceed come Hell or come high water!

17 No adjournments. No requests for adjournment. It
18 is going to proceed. And here we are! And I say,
19 why! Why all this unseemly haste! Somebody picks
20 a day out of the air and says can you go that day.
21 They don't say can you go that day, they say, Go
22 that day! That is uncommon too.

23
24
25 THE CHAIRMAN: Mr. Paroian, you
26 continually use the expression "unseemly haste". Do
27 you have any idea how long it takes to get an
28 average application of the Railway Transport Committee
29 to hearing?
30





I-9

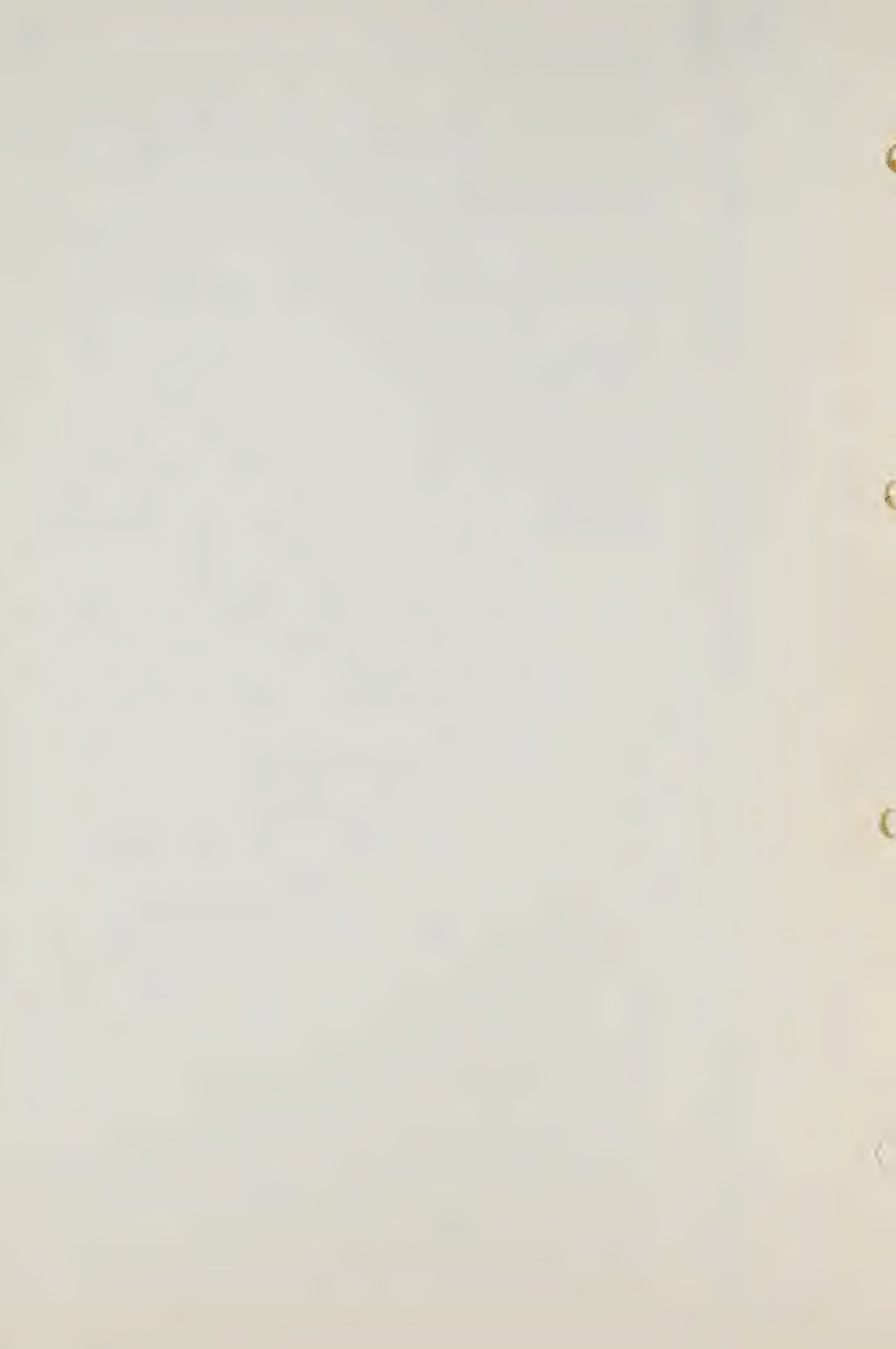
1 MR. PAROIAN: No, I would like to know.

2 THE CHAIRMAN: I don't know myself
3 but I think this is probably ---

4 MR. PAROIAN: This is the problem, you
5 see. You see what I mean? The last hearing got
6 started, sir, well, not the last hearing but the
7 Jones/LaBorde hearing, if I may, got started in
8 April, maybe May of '75 --- June of '75. It got
9 adjourned after eight days I believe of proceedings
10 and it did not get reconvened, sir, for 15 months!

11 THE CHAIRMAN: Mr. Paroian, of course
12 I can only speak from my own experience. I have held
13 quite a number of hearings for the Railway Transport
14 Committee and normally we got going about 30 days
15 after it was decided to hold hearings but your
16 experience may have been different.

17 MR. PAROIAN: Well, my experience is
18 based on what I have seen here and my people say,
19 the people say, Why! How come 15 months when the
20 CP is using the track unlawfully. You don't have
21 to be geniuses to figure out they were using the
22 tracks unlawfully. You can go down and look and
23 there are trains running up and down every day and
24 I wrote three times to your Committee asking for a
25 copy of the approval under Section 216 and they
26 never said hello, good bye, or jump in the lake.
27
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30





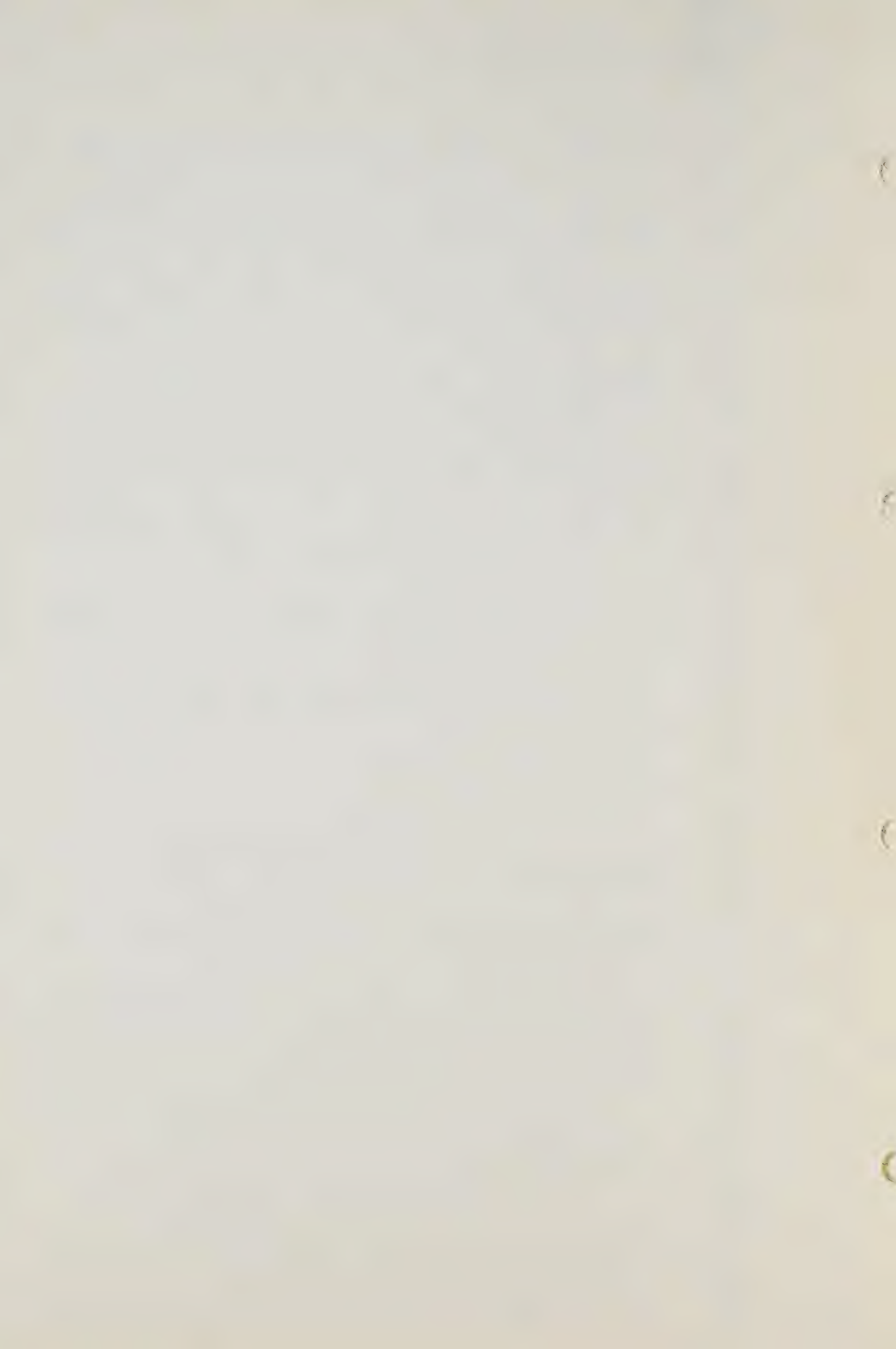
I-10

1 We found out later that they never did have that
2 approval, 15 months later, so when these people say
3 how come and when I say bad faith--- and I want you
4 fellows from the media to get this correct. I am
5 not talking about bad faith in the ordinary sense.
6 This is a legal connotation. It is a legal
7 principle that can be misinterpreted by the layman
8 and I just do not want you fellows walking away
9 putting words in my wide mouth that are not there
10 because our people are going to ask that and they
11 have asked that question and you are going to have
12 to answer that question and then on top of all this
13 we get down to the first motion or the second motion
14 that was made. Man, we are going to the Federal
15 Court of Appeal!

16
17
18 THE CHAIRMAN: Mr. Paroian, I think
19 before we go any further I should suggest to you that
20 when you appear before a panel which have the powers
21 of Justices of the Superior Court for the purposes
22 of conducting hearings that you should be extremely
23 careful how you allege "bad faith".

24
25 MR. PAROIAN: I am not understanding
26 you, sir?

27
28 THE CHAIRMAN: You are appearing
29 before a panel which for the purposes of conducting
30 public hearings have the powers of Justices of the





J-11

1 Superior Court.

2 MR. PAROIAN: I appreciate that.

3 THE CHAIRMAN: And I suggest to you
4 that you be very careful if you are alleging bad
5 faith on the part of members of that panel.

6 MR. PAROIAN: I am alleging it is not
7 on behalf of the members of this panel as I told you
8 but basically on behalf of your whole Committee and
9 I have laid out a series of facts and have
10 marshalled to you a case that has laid out a
11 precedent that I believe not directly but by the
12 principle enunciated in that case can apply here
13 and if I am to be restricted in my legal argument
14 on that basis then I should know now because I will
15 not be doing my function as I see it, as I should be
16 doing it for my clients.

17 I gather what you are saying is: watch
18 out Paroian, you can be charged with contempt.

19 THE CHAIRMAN: Well, I ---

20 MR. PAROIAN: And I ---

21 THE CHAIRMAN: Well, I am suggesting
22 to you that if you are alleging bad faith it falls
23 to you to prove it. And if you are not --- I am
24 just trying to be your friend. If you are not in
25 a position to prove it perhaps, you had better
26 think about it a little bit.



J-12 1

MR. PAROIAN: My friend brings a
2 very accurate point to my attention and I thank him
3 for it. I am not alleging "bad faith". I am
4 alleging bias. Legal bias. Legal principle --
5 the legal connotation of bias, particularly as it
6 is expressed in this particular case. The theory ---

7

8

THE CHAIRMAN: Then I presume you are
retracting your allegations by bad faith?

9

10

MR. PAROIAN: I did not know that I
ever said anything about bad faith.

12

THE CHAIRMAN: Well ---

13

14

MR. PAROIAN: Well, if I did then I
do retract it.

15

16

THE CHAIRMAN: I think that the record
will show what you said. I do not think there is
any question about what you said.

18

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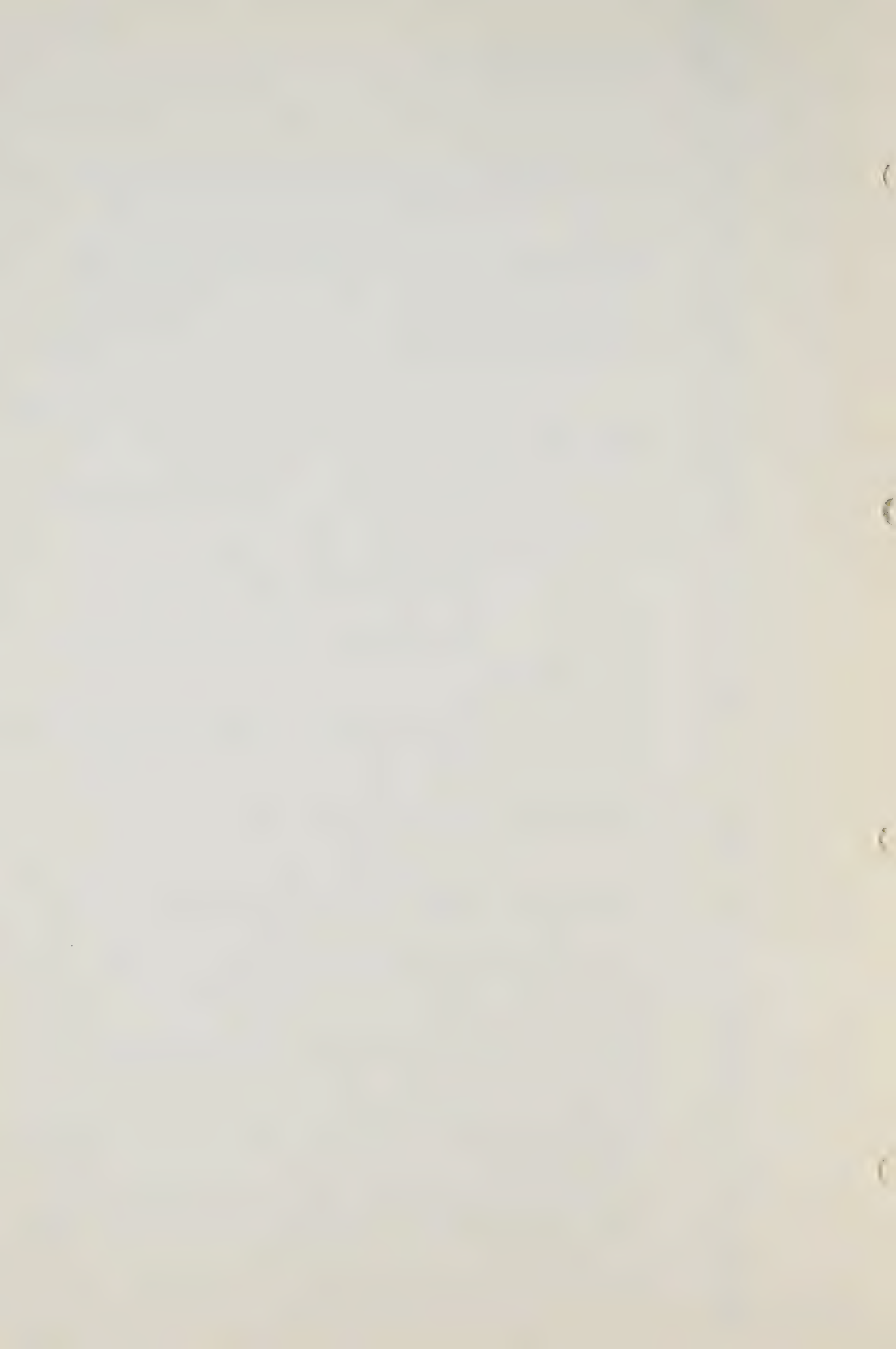
MR. PAROIAN: Well, if I have then
I retract any suggestion of bad faith but I say to
you, having retracted that allegation of bad faith
by the three of you, or any members of you, the
Committee, that the facts demonstrate a previous
position, if you will, the rare facts that we have
outlined raised in the minds of a reasonable person,
reasonable, intelligent man, a real apprehension
that an appointee, or Committee, if you will, might
well be swayed by bias albeit unconscious. In

27

28

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J-13

1 those circumstances the appointment should be
2 set aside says this case.

3
4 On that same principle and I think I
5 said your bias, legal bias may be unconscious but
6 it finds itself in these facts that have developed
7 and these facts that have developed indicate a
8 course of conduct by your Committee up to a given
9 point and then a dramatic divergence from it. When
10 I say by your Committee I mean the Rail Transport
11 Committee of such a nature and such a magnitude that
12 it could create a real apprehension or raise a real
13 apprehension in the mind of a reasonable person.
14

15 Now that is not alleging bad faith
16 and if I used those words I apologize and I retract
17 them.

18
19 THE CHAIRMAN: The apology does not
20 interest me, the retraction does.

21 MR. PAROIAN: ;So far as the facts
22 being marshalled in support of the allegation of
23 bias on the principle that I have again enunciated
24 of course, I submit that they are there and you
25 should be looking at them and I submit that there
26 is the trite old saying, not only must justice be
27 done it must manifestly appear to be done, is to
28 be followed. You should at least, at the very least
29 and I submit there is more that you could do, or
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should at the very least in clear unequivocal
language lay out the reasons for some of the facts
existing as they have.

- - -



J.1
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1 ... and the reasons for not granting this adjournment
2 in a clear, compelling and logical method. To do
3 otherwise is to permit people to leave this room
4 perhaps believing that justice wasn't being done and
5 as lawyers we don't want that to happen.
6

7 Remember that I am not saying in this
8 argument you mandatorily must rule in my favour.
9 Albeit our submission is that we would like you to
10 but I am not saying that you have to rule in our
11 favour, but what I am saying is that in the exercise
12 of your judicial discretion you decide to rule against
13 us (which I sincerely hope you will not) you will at
14 least carefully and unequivocally spell out the
15 reasons for not acceding to our motions.
16

17 In my submission there are basically
18 three motions now before you. One, the motion that
19 you stand down for one of jurisdiction. Two, that
20 you stand down on the principle enunciated in
21 Regina against Moore and in the alternative, three,
22 that in any event an adjournment of these particular
23 proceedings be granted pending the outcome of the
24 present litigation involving the most recent appli-
25 cation to the Federal Court.
26

27 Those are my submissions.

28 THE CHAIRMAN: Thank you. Yes?

29 MR. PAROIAN: I hate to interrupt but
30



J 2

1 over the break there were some people who spoke to me,
2 some of the public who spoke to me with a view to
3 being given a opportunity to speak in favour or against
4 our particular position.

5 THE CHAIRMAN: I see.

6 MR. PAROIAN: I would think, and it
7 would be my submission with the greatest of respect,
8 but particularly because these people have been
9 involved throughout and because they have demonstrated
10 throughout a concern and a regard for the rule of law
11 that is exemplary that they should be allowed to
12 participate in the rule of law because to do otherwise
13 is really to case it into a different light altogether.

14 This should not be a battle for lawyers
15 alone and if they have something to say I submit to
16 you that they should be heard. We lawyers sometimes
17 say a lot of things that they would like to add to or
18 subtract from and I don't what they are going to say.

19 THE CHAIRMAN: Well this is rather a
20 departure from normal practice in public hearings in
21 that normally members of the public are given a chance
22 to present their views on the main issues.

23 We normally break at this time. During
24 the lunch break I will consider that request with my
25 colleagues and try to make a decision and announce the
26 decision when we resume this afternoon.



J 3

2

I think we will adjourn now and ---

MR. FISHER: Mr. Chairman, if you are going to deliberate over that question over the lunch hour I would hope that you would consider my support for my friend's submission concerning entertaining submissions from the public in general. Again bearing in mind the nature of this Application.

We refer to the main Application and surely it is rather germane to what we are doing here whether or not the matter ought to proceed and I certainly do believe that the people ought to be heard on that.

THE CHAIRMAN: Well, Mr. Fisher, sometimes we have hearings and we have two or three hundred people present and if they all argue on the question of adjournment we could be here until some time next July just on the question of adjournment.

How many people are involved?

MR. PAROIAN: I would think the people that have filed appearances with you, sir. I would be hard pressed to figure out how you could -- they are interveners and if they have filed appearances with you I would think that they have asked to be heard and my submission would be that they are just as much a party as the person that I represent and to deny them the right to be heard might not be the most



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1 seemly thing to do from the point of view of the
2 administration of justice.

3 THE CHAIRMAN: Let me worry about the
4 seemly part.

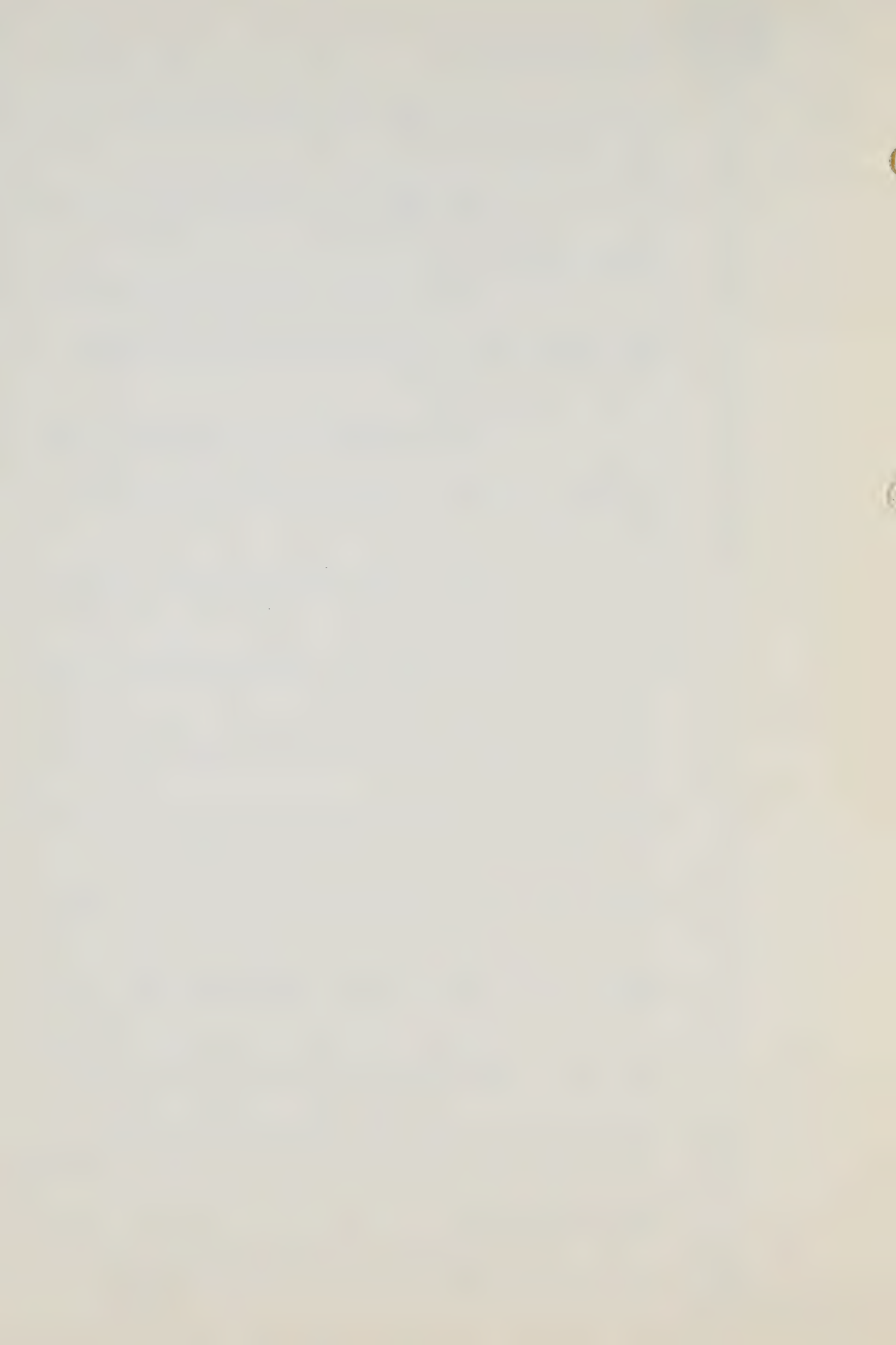
5 Could I have a show of hands as to how
6 many people would like to speak on the question?

7 Twelve.

8
9 MR. CHALMERS: Mr. Chairman, I have
10 no emphatic views -- emphatic submissions to make
11 either way.

12 All I would say to you, Mr. Chairman,
13 with the greatest deference, is that if you undertake
14 to do this (and possibly you should in light of the
15 accusations of bias and so on that have been made)
16 and to lean over backwards -- and in the event that
17 Canadian Pacific should be successful I obviously want
18 your hearings, with any favourable decision, to
19 survive the initial review of which you have been
20 given notice of already and it might be wise -- I do
21 submit to you and to the lay interveners that they
22 should be instructed that they are dealing with the
23 question of adjournment or jurisdiction or bias.
24 They are dealing with the three questions that Mr.
25 Paroian has very ably enumerated and I think you only
26 have so much time.

27
28
29 You don't want to receive scads of
30





J 5

1 unsworn evidence on hootings of trains. There will
2 be another time and other occasions no doubt for that
3 and that is my only concern.

4 FATHER GIROUX: I would like to speak.

5 THE CHAIRMAN: Just a moment, please.

6 FATHER GIROUX: I think he is a lawyer
7 and a lawyer has a place in the court but we have a
8 place in this process.
9

10 THE CHAIRMAN: Just a minute, please.

11 I wish to have a short consultation
12 with my colleagues. Perhaps what you have to say
13 might not be necessary.
14

15 --- Off record discussion

16 THE CHAIRMAN: Okay. I have discussed
17 the matter with my colleagues. It didn't take too
18 long to reach a decision. We will hear those twelve
19 individuals first thing this afternoon and I would ask
20 that you confine yourselves to the questions of
21 whether the hearing should be adjourned pending the
22 resolution of the matter in the Courts. In other
23 words speak only to the question of adjournment and
24 not in fact in connection with the Application on its
25 merits.
26

27 MR. FISHER: Pardon me, Mr. Chairman.
28 One other point. Would it be of assistance to you if
29 copies of the judgments of their Lordships Mahoney and
30



J 6

1 Gibson were given to you or do you have those?

2 THE CHAIRMAN: I have read Mahoney's
3 judgment. I don't have Mr. Justice Gibson's. I don't
4 have either of them with me.

5 MR. FISHER: If you could give me
6 possibly ten minutes my office is located quite nearby
7 and I could have copies delivered to you if you could
8 tell me where that may be.

10 THE CHAIRMAN: Okay. We are at the
11 Richelieu.

12 MR. FISHER: Fine. I will see that
13 that is done.

15 THE CHAIRMAN: Well perhaps they could
16 be put into the retiring room.

17 MR. FISHER: Fine.

18 THE CHAIRMAN: It is just across the
19 hall. We will adjourn until two o'clock.

20 MR. CHALMERS: Before you do -- I am
21 sorry, Mr. Chairman. Could the twelve individuals
22 be told that they have the right to speak on
23 jurisdiction as well as the adjournment? In other
24 words with respect ---

26 THE CHAIRMAN: Oh, yes.

27 MR. CHALMERS: I think it should be
28 the three issues.

29 THE CHAIRMAN: There were three issues
30



J 7

1 ladies and gentlemen. Argument that we have no
2 jurisdiction. The argument that we are biased and
3 the argument that the hearing should be adjourned
4 pending the outcome of litigation.

5 MR. GABRIEL CHARRON: Mr. Chairman
6 one minute please. A lot of people are asking ---

7 THE CHAIRMAN: Could you identify
8 yourself, please?
9

10 MR. GABRIEL CHARRON: My name is
11 Gabriel Charron and I am a legal intervener.

12 THE CHAIRMAN: Yes?

13 MR. GABRIEL CHARRON: A lot of people,
14 including myself, are asking when they can be heard to
15 the main question if it goes on. If this is not
16 adjourned.
17

18 Now will there be evening sessions?

19 Now I ask this question because in my
20 letter of intervention -- will there be evening
21 sessions where people can make their presentations
22 and barring that indeed try to schedule our presen-
23 tations or you try to schedule your presentations
24 around us.
25

26 THE CHAIRMAN: Well first we have to
27 decide whether are going to go ahead or not.

28 MR. GABRIEL CHARRON: Yes.

29 THE CHAIRMAN: Once that is decided,
30



AA-1

1

--- On Resuming

NGeg

2

THE CHAIRMAN: Good afternoon, please

3

be seated.

4

5

May I inquire if any agreement has

6

been reached as to the order of making their

7

presentations by the members of the public?

8

MR. PAROIAN: I did not canvass that

9

but if you wish, sir, in any way that we can assist -

10

11

THE CHAIRMAN: I might be placed in

12

the uncomfortable position that if I ask I will get

13

eleven hands and I have to pick one and then the

14

others may feel -- it is always helpful if you can

15

have some agreement, but if not then I will try to

16

take one at a time in whatever order they put their

17

hands up.

18

MR. PAROIAN: I think Dr. Henderson.

19

THE CHAIRMAN: When you come forward

20

would you identify yourself please, so that we --

21

22

DR. HENDERSON: My name is Gordon

23

L. Henderson, I am a physician in the City of Windsor

24

and I reside with my family on that walk of Lincoln

25

Road immediately north of the Powell marshalling yard.

26

27

Now I regret that I am not able to be

28

as eloquent as our legal friends and I have to refer

29

to notes. But I feel that although the history of

30

this hearing over the years has been adequately



1 covered from a legal point of view by Mr. Fisher,
2 that the Commission should be aware of certain
3 things that have taken place during the course of
4 this hearing that you probably could not evaluate
5 from the reading of the cold facts presented in the
6 3,000 pages of transcript.

8 I am addressing myself to your three
9 points that you mentioned before lunch, but it is
10 going to take some time to reach this and I hope you
11 will bear with me.

13 In the spring of 1974 the people in
14 our area noticed some activity on the property
15 immediately adjacent to the CPR main line that runs
16 between Howard and Walker Road in the City of
17 Windsor. We did not learn until the summer of '74
18 that this yard was to be used to hold loud, dirty,
19 noisy trains for many hours at a time, creating an
20 unbearable noise, pollution of the air with diesel
21 fumes, which by the way gentlemen, has been found
22 to/a carcinogenic agent, and creating an immediate
23 danger to those residing in the area.

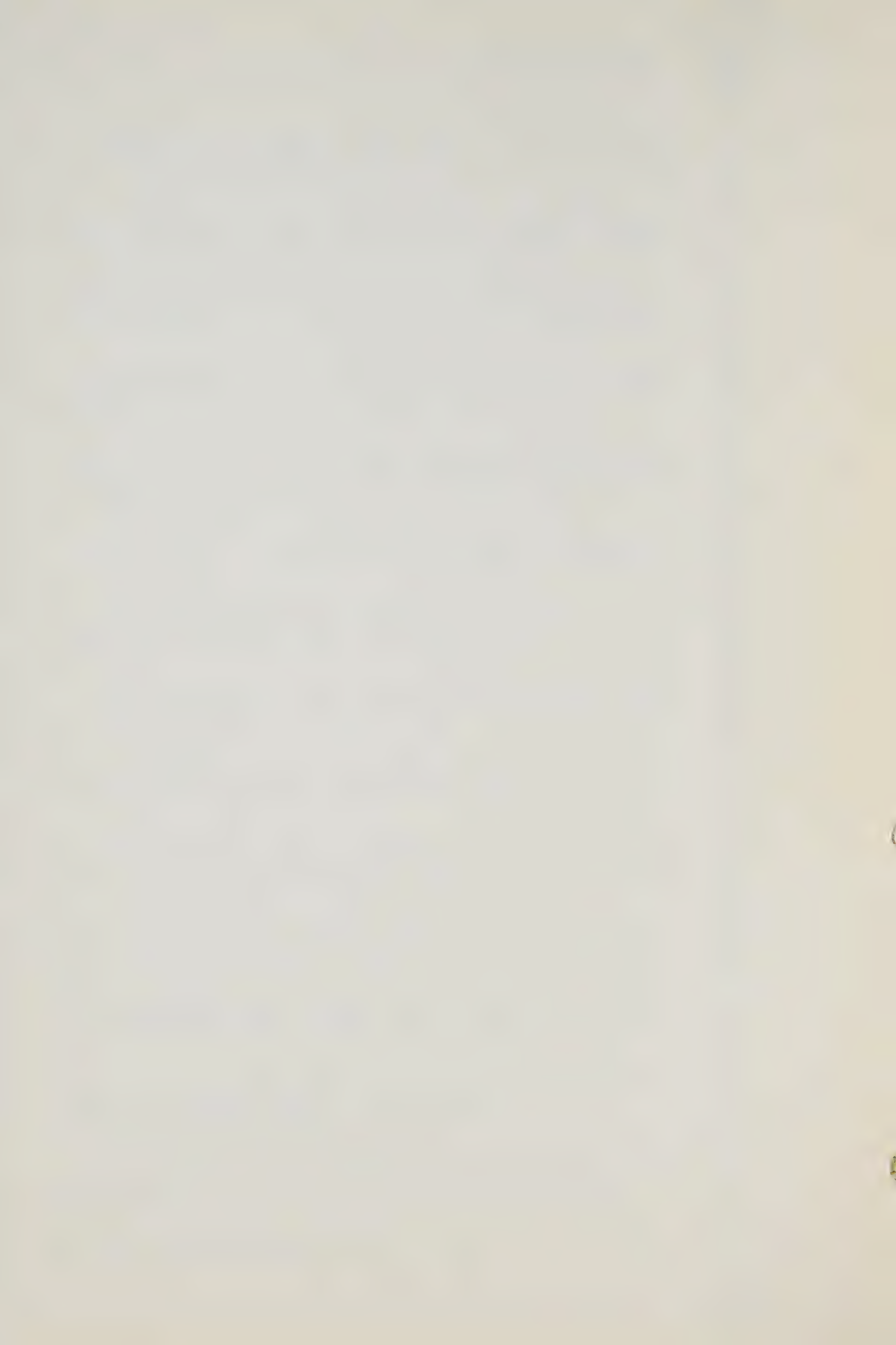
25 As the summer wore on the condition
26 became intolerable to the point where one could not
27 sit outdoors because of the noise and fumes.

29 Now because of this situation I made



1 representation to our area Member of Parliament,
2 the Member of the Provincial Parliament and to the
3 Mayor's office. And I would assume that as a result
4 of these efforts and similar efforts on behalf of
5 other people in the area, that I was visited in my
6 home in early October of 1974 by a delegation of
7 two representatives of the CPR and an engineer from
8 the Railway Transport Commission. I must say that
9 the attitude of the CPR representatives at that time
10 can only be described as arrogant. It was their
11 feeling that the railroad was there when I moved in,
12 which was quite true. But the situation had changed
13 dramatically from a single line carrying a few
14 trains a day to a full scale marshalling yard where
15 the trains just sat there by the hour, ^{with} the noise and
16 the dirt that resulted as a result of these trains
17 sitting. Also when I expressed concern for the
18 danger to the children playing in the parked railroad
19 cars their answer was that people should keep their
20 children at home. This answer was reiterated in
21 a later meeting held with the citizens.

22 By the way, I might mention at that
23 time that the north fencing that is presently in
24 place was not in place at all or was absent through
25 much of its length. It had been bulldozed down during
26
27
28
29
30





1 the construction of these sidings and remained down
2 from, I would estimate, July of 1974 until early
3 in the winter of 1975, February, March. There was
4 no fence at all.

5 The situation with regard to the
6 trains became worse and on the Thanksgiving
7 weekend of 1974, one train sat for over 24 hours
8 with its engines idling. This would run anywhere
9 from three to five engines, I believe there were
10 three engines on that particular train. And
11 just consider, gentlemen, this was at a time when
12 we were faced with what was called a critical fuel
13 shortage in the country.

14 It was obvious that we could get no-
15 where trying to reason with the CPR. I say as an
16 aside in spite of the fact that, that the CTC
17 engineer assured me that the CPR was "a good
18 Corporate citizen". This has not been borne out.

19 Further presentation to our political
20 representatives and the combined effort of the
21 people of Remington Park resulted in June of '75 in
22 a public hearing before a Commission of the CTC .

23 We knew that as lay people we would
24 not stand a hope in Court with the shrewd lawyers
25 of a Corporate giant. So we wisely retained legal
26 counsel. It might be interesting to note that as
27
28
29
30



1 we went into the first hearing one of the lawyers
2 representing the CPR said to the effect that this
3 would take about half an hour at most. Here we
4 are three years later.

5 As a direct result of the efforts of
6 our legal counsel the Commission ruled that CPR
7 had crossed the walkway illegally and must cease
8 doing so. CPR could continue to use the tracks but
9 only up to the Parent Avenue crosswalk. Because
10 of the restriction of time available to the members
11 of the Commission that the hearing was adjourned to
12 be reconvened within a matter of a few months, that
13 was our understanding.
14

15 This did not occur until September of
16 '75. On the second hearing it was ruled by the
17 Commission that the CPR had constructed the tracks
18 illegally, against the Railway Act and had opened
19 the tracks illegally, contravened another section
20 of the Railway Act; and that the use of these
21 tracks must be discontinued until proper
22 application was made. I stand corrected, that was
23 September of '76.
24

25 How long did it take the lawyer
26 representing the CPR to make an application of this
27 sort? As I have said, the Chairman moved that the
28 Railway had to stop using it until the application
29
30



1 was produced. You would expect that the secretarial
2 work required for producing such an application would
3 take two or three weeks at least, and the review of
4 the Railway Act. Within a matter of seconds of
5 that ruling the lawyer representing the CPR produced
6 the necessary application which had been obviously
7 contained in his brief case all along, and tried to
8 insist that the Commission hear this application
9 immediately.
10

11 However, wisely the Commission ruled
12 that the people must be given time to pursue their
13 case in resisting this application.
14

15 I might mention that during the year
16 that the CPR had contravened two sections of the
17 Railway Act. That is that they in fact broke
18 Federal law. The CPR, I understand, from my little
19 knowledge of the Railway Act was subject to a fine
20 of up to \$200 a day but at no time was this fine
21 ever imposed on the Railroad.
22

23 Do you gentlemen feel that any
24 individual in this room could break a Federal
25 Statute deliberately and do so for twelve months
26 without being prosecuted to the full extent of the
27 law? Not likely.
28

29 The hearing on the application opening
30 the tracks by the CPR was held in April of this year.



1 During that hearing the CPR was allowed to fully
2 state its case.

3 I might also mention that the CPR
4 super lawyer from out of town was present during that
5 hearing and the case was adequately presented.

6 The case for the Railroad came up
7 lacking, and as a Railroad could not prove that this
8 marshalling yard could be operated safely for public
9 use and the application was dismissed. It was our
10 understanding that a hearing on costs, which was part
11 of our argument in this application would be rendered
12 within a brief period and that no further hearing
13 would be entertained until the previous one was
14 concluded.

15 You have heard this document by Mr.
16 Fisher. However, during the summer of 1977 an
17 attempt was made to hold this hearing on costs by a
18 new Commission, in spite of the assurance from the
19 CTC.

20 You want to remember also that this
21 new Commission is entirely unfamiliar with the
22 preceding stalling tactics employed by the CPR.
23 This would be heard in Ottawa and at the time when
24 the people of our area, the principals and the
25 lawyers were away on vacation. We were given short
26 notice, no attention was paid to our cry of "foul".
27
28
29
30



1 The only thing left for us to do was to take the
2 CTC to Federal Court to try and prevent this hearing.

3
4 Now this probably aggravated the
5 CTC somewhat. But else could individuals do when
6 faced with this situation. The Decision of the
7 Federal Judge went against us but this Decision has
8 been appealed, and this appeal has not yet been
9 heard. And we hear contradictory evidence from two
10 Federal Judges, one who understands that there
11 should be a stay because the appeal has not been
12 heard, and another who says that the matter of cost
13 has been settled.
14

15 This leaves the people in the area
16 rather confused as to what is happening in the
17 Federal Court. I might also mention that during
18 this period of time until this present hearing a
19 concerted effort on the part of CPR to influence
20 the wealthy and influential members of the community
21 has been carried out and has been duly reported in
22 the press. One of the members of the CPR
23 in speaking before the Manufacturers Association in
24 Windsor implied that the people in their efforts to
25 try and block the use of the CPR were interfering
26 with the economy of practically the entire North
27 America.
28
29

30 Now I am not exaggerating this. I



1 believe, Maine, Vermont, New Hampshire, Ontario,
2 Texas and California were mentioned in this
3 application.

4 Now we face yet another hearing on
5 the part of the CPR by a new Commission who has
6 little knowledge of the previous delaying tactics of
7 the CPR lawyers.

8
9 Gentlemen, I have been involved in
10 this case since the very beginning. Personally I
11 have attended I would say probably 95% of the
12 hearings that have taken place. I probably know
13 more about the previous hearings than any of you do.

14
15 How can you gain the sense of
16 arrogance on the part of CPR by reading 3,000 pages
17 of transcript? It seems to us, gentlemen, that the
18 previous Commission having ruled on three separate
19 occasions on behalf of the citizens of this area
20 has been deliberately replaced so that this mistake
21 will not be made again.

22
23 It is our feeling that you can hear
24 with a prejudice in regard to the CPR and that we
25 are going to go through the motion to make it look
26 good and to give some impression that we are living
27 in a democratic society where the voice of the
28 individual means just as much as the voice of a
29 Corporate giant.
30



1 Gentlemen, I would ask you what are
2 you doing here? The previous Commission of the CTC
3 turned down the application of CPR. Nothing has
4 changed in the meantime. The CPR has done nothing
5 except to cut a few weeds recently and to mend a few
6 holes in the fence.
7

8 I might mention that along with my
9 impressions of the action of the CTC, they are further
10 shaded by the fact that in August I wrote a letter to
11 Mr. d'Avignon with regard to the presence of the weeds
12 and the Powell pond which exists throughout the entire
13 length of this siding. The recommendations from the
14 CTC engineer that were presented in April of this year
15 recommended that the weeds be kept cut and the Powell
16 pond be drained. These orders were never carried out
17 until late in the summer, I believe in September. And
18 I might also say that my letter to Mr. d'Avignon has
19 never been acknowledged.
20
21

22 It is small wonder when we have this
23 kind of reaction from the CTC that we wonder if there
24 isn't some element of bias.

25 Another thing that worries us, we have
26 had a ruling from members of the CTC, from the
27 Commission of the CTC. Were these members of your
28 previous Commission so inept that it was felt that they
29 could not longer handle this case? Or could it be that
30



1 this was decided on the part of the CTC that they
2 must be replaced by Commissions who would look more
3 favourably on the CPR application, and to Hell with
4 the discomfort, loss of property value and indeed,
5 personal danger that has to be faced by the
6 residents of this area.

7 Thank you gentlemen.

8 THE CHAIRMAN: Thank you, Doctor.

9 MR. GABRIEL CHARRON: My name is
10 Gabriel Charron and I live at 2663 Turner Road. My
11 main thrust is pretty well parallel to Dr. Henderson's.
12 One fine day during the summer of 1974 I noticed
13 trucks going up and down our street loaded. I was a
14 paying
15 bit concerned because I had just finished all the
16 improvement taxes on our street and I was afraid that
17 it was going to be broken up.
18
19
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BB.1
PC/ko

1 So, I went down to the end which was
2 not very far, I only live about 500 feet from the
3 CPR Railway, and lo and behold there is a bulldozer
4 and they are taking out great chunks of fill, of
5 earth, and loading them on trucks and hauling them
6 away. So I thought at that time, well, CPR is
7 finally smartening up. They are going to put in a
8 second line to the main line the same as the CN has
9 done.
10

11 So, in any event I called the City of
12 Windsor and spoke to someone in the Traffic Department
13 and asked them if they could remove, temporarily, the
14 blockage at the end of the street, which they did so
15 that all this dirt and what have you could be hauled
16 out from that end.
17

18 Now, once this was all done the stone
19 was brought in and of course it was all levelled off;
20 ties were dropped off and at this point I was still
21 under the assumption that we were going to, or the CP
22 rather, was adding a second line to the main line.
23 I asked the people in the bulldozers -- they were
24 like the three monkeys, the three wise men.
25

26 A little later on I suddenly realized
27 that something was wrong. They were in effect adding
28 two tracks, one on each side of the existing main line,
29 one north and one south and when that was finished
30



BB 2

1 CN began shunting and storing cars on the sidings.

2 Gord mentioned that trains idle at
3 great lengths. He did not mention that freight was
4 also stored overnight on occasion on the sidings.

5 THE CHAIRMAN: Mr. Charron, I do not
6 like to interrupt you but you referred to CN and I
7 think you meant CP.

8 MR. CHARRON: CP, I am sorry. I don't
9 want to use their name in vain.
10

11 Anyway after my difficulty, and as
12 Gord pointed out, a hearing was finally called for
13 June 17, 1975 at the University of Windsor at which
14 time we had evening sessions which I requested here
15 so that those people who are working could make
16 representation.
17

18 Those hearings adjourned and after 15
19 months they resumed again in September of 1976, again
20 as Dr. Bricker mentioned. We suffered through the
21 trains illegally that were there illegally on those
22 sidings for a full two years. I have documentation
23 which I will bring in my main delivery as to what
24 effect and what cause this had on the neighbourhood.
25

26 Powell Yard was finally closed
27 September, 1976 by Mr. Jones and Mr. LaBorde. CPR
28 then, again as Gord mentioned, began pulling appli-
29 cations out of briefcases. They looked like magicians
30



BB 3

1 pulling cards out of hat in trying to get them put on
2 the order paper or on the floor which Mr. Jones wisely
3 refused.

4 CP was in fact told to submit them
5 properly, put the proper time limitations and what
6 have you and then they would be considered -- if they
7 would be considered was the word. He did not say
8 they would be considered.
9

10 Now, since that time and again I wonder
11 why all the rush, we had a new CP application on March
12 29, 1977. We had a quickie hearing called in Ottawa
13 to review the costs by a new panel during the month of
14 July, as was pointed out, when people are on vacation
15 with two weeks notice, and incidentally I did not get
16 a notice of that hearing even though I was not
17 directly involved in costs since I do not have an
18 attorney, I do not have counsel but I felt it was a
19 relevant concern to me and therefore I should have
20 received a notice of those hearings.
21

22 Another point, the lawyers then went
23 to Federal Court over this. Now, at the point the
24 CTC cancelled the hearing set for July. Now, in both
25 cases, and I will get to the other where the lawyers
26 were in Federal Court fighting these applications
27 you might say or these current events, they were
28 fighting both the CTC and the CPR in concert you might
29
30



BB 4

1 say and now here we are back, costs have not been
2 settled -- excuse me -- nothing has changed, costs
3 are not settled. Mr. Jones said the new application
4 or re-hearings of no type would be entertained until
5 such time as the rulings had been made as to costs.

6 So then I ask: why are we here? It
7 was ruled that the CPR used the tracks illegally.
8 They were built illegally across Parent Avenue
9 crossing. It was ruled that the tracks were unsafe
10 so why are we here? Why the big rush? We suffered
11 two years with the trains while waiting for the
12 hearings, 15 months! The CPR was in no rush then.
13 Since the tracks have closed we've had the CPR
14 Application in March, the CTC quickie hearing again
15 as I mentioned, and the present CPR Application all
16 since March '77. It took us 15 months to get one.
17 The costs still are not settled. We were told that
18 they would not be settled before further hearings or
19 re-hearings or whatever and I'm afraid I have to
20 agree with my friend, the doctor, that there is bias
21 in effect. What else can we think? What else are we
22 led to believe?

23 At this point we have a new panel.
24 New hearings and it is being rushed through. What
25 else can we believe?

26 Thank you very much.
27
28
29
30





BB 5

1

THE CHAIRMAN: Thank you.

2

MR. CHARRON: Excuse me, I move for adjournment as the lawyer suggested.

3

2

4

THE CHAIRMAN: Who is next?

5

DR. BRICKER: Mr. Chairman, I am

6

7

James Bricker, also a physician. I would like to ask again the question: why is there a hearing at this time? What is a hearing? A hearing is surely to hear evidence. We have heard all the evidence time after time after time ad infinitum adnosium we have heard the evidence. Why are we here again? The CPR says "a fresh Application".

8

9

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23

Mr. Chalmers was here at the time of the last hearing. He heard the evidence and he heard the CPR say that there was no more evidence. I am not here to play charades! I am a busy physician. This is costing me all kinds of money to come here and it's costing all these other people all kinds of money to come here. If we are playing parlour games please call a halt to it!

24

25

26

27

28

29

30

Why is there a new tribunal? The new tribunal seems to be coming in cold perhaps in more ways than one. You said Mr. Chairman that you were Chairman of the Water Transport Committee. Perhaps your confreres might be related to the Air Transport Committee. The only thing I can think of that



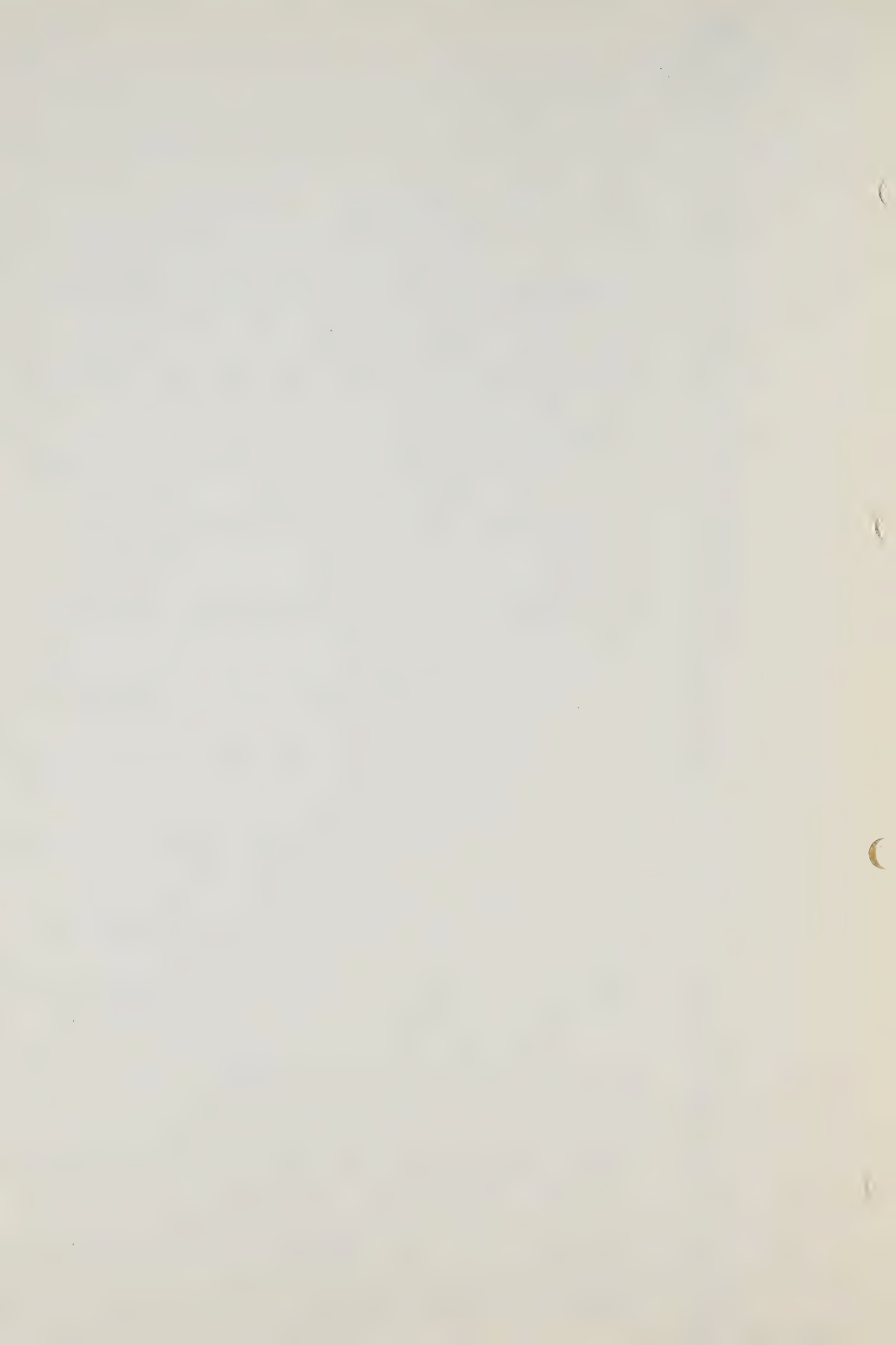
BB 6

1 these three things have in common is possibly CP is
2 rather large in all three.

3 Are we going to let the 2600-odd pages
4 of transcript gather dust, throw them in the corner,
5 ignore them! We put all kinds of effort and time and
6 money into that transcript. Why should it be thrown
7 and cast aside into the corner?
8

9 Promises! Promises! Does a promise
10 mean anything these days? Why did Mr. Jones not
11 honour his promise to decided costs. He promised us
12 right in this room that he would decide costs before
13 he left Windsor but then he sort of left us hanging
14 and said well I haven't quite come to a decision. Mr.
15 LaBorde and I are not of a mind but I promise you "we
16 shall decide costs as soon as we get back to Ottawa".
17

18 That gentlemen was in April. We have
19 not heard from Mr. Jones. We do not see Mr. Jones.
20 Where is Mr. Jones! Why did Mr. LaBorde's opinion
21 differ from his anyway? Surely a distinguished lawyer
22 from Winnipeg, Chairman of the Railway Transport
23 Committee, why would another member of his panel not
24 agree with his decision on legal costs and why indeed
25 was the hearing called in Ottawa this summer when all
26 of us were away? People were on vacation. A very,
27 very, very bad time for the City of Windsor citizens,
28 perhaps rather convenient for the CPR. Maybe they take
29
30





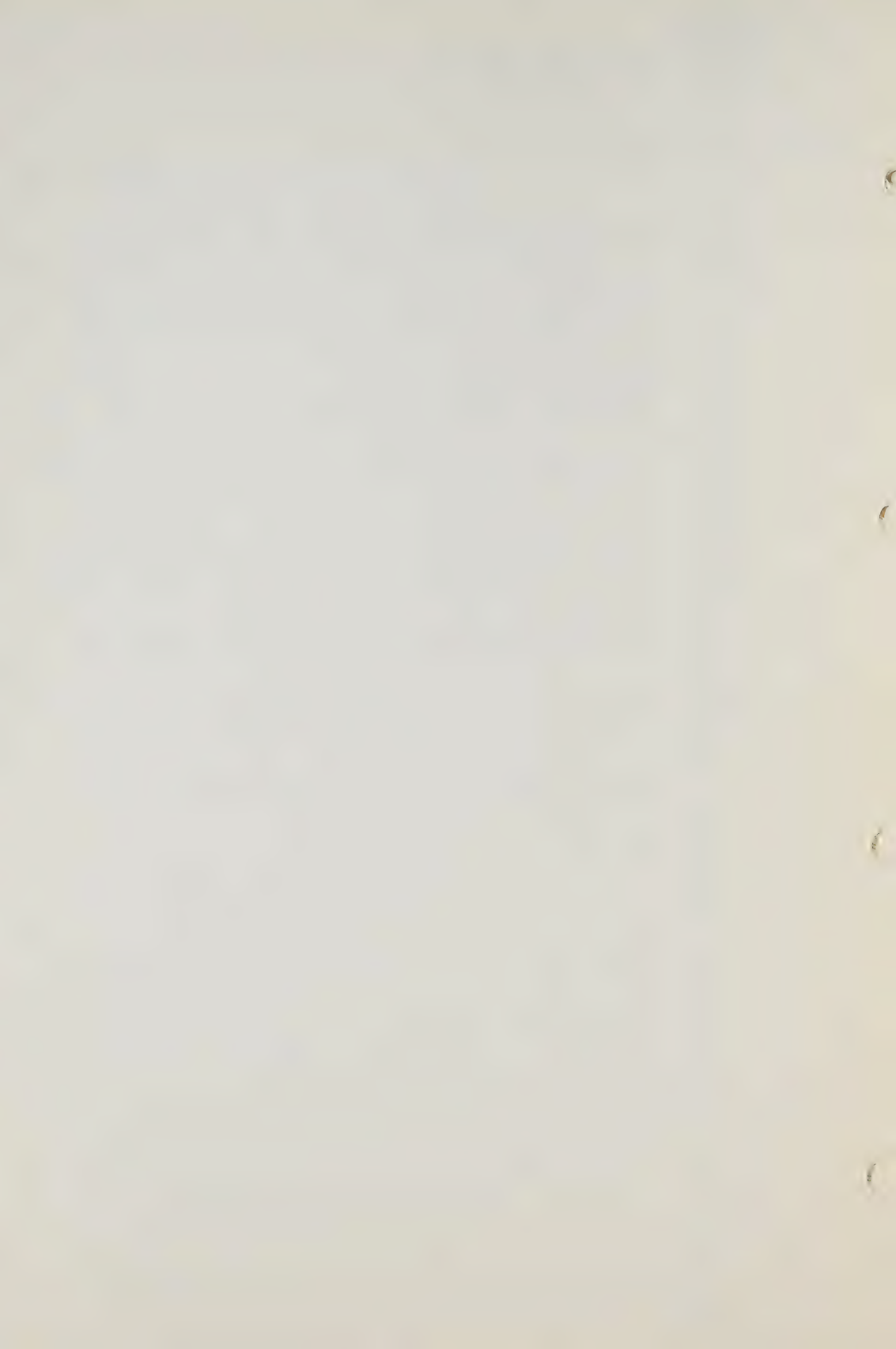
BB 7

1 their holidays in the winter.

2 And what about the word "waste". Why
3 are you putting the taxpayers, let alone us, the
4 taxpayers of Canada to such an expense, hearing after
5 hearing after hearing. Why? CPR broke the law. I
6 did not say that. The CTC said that. Mr. Hibbard
7 said that. "CPR broke the law." You said it. You
8 said this morning CPR is "entitled to make a second
9 application". You said CTC's duty is to hear it.
10 Why? CPR broke the law! Why should the law then
11 pay any attention to them! Let alone cater to them!
12 They have broken the law, they have undercut it.
13 They have cast it aside. Why should they be entitled
14 to make a second application and why should you be
15 under any obligation to hear from people who are
16 guilty of illegal activity?

17 CPR's credibility. My oh my, CPR's
18 credibility! Just let me mention one or two points
19 about CPR's credibility. At the first hearing CPR
20 was asked by the Chairman specifically to produce their
21 records of the times the trains have been parking on
22 those blank blank sidings but CPR said: Gee, I'm
23 awfully sorry, Mr. Chairman, but we lost those
24 records. Yes, they lost their records!

25 Then, a little later in the same
26 hearing the Chairman said: (and I'm quoting the
27
28
29
30





BB 8

1 Chairman at this point he said) "How a marshalling
2 yard was" -- he didn't say that. He said: " How a
3 marshalling yard was planned for something far
4 greater than two trains meeting per day. Twelve,
5 22?" And, at this point he said to CPR: What are
6 your projected usages of this siding for the year
7 2000? In other words what are we talking about?
8 Are we talking about a full-scale night and day
9 operation or what? He asked for the projected use
10 of those sidings and that projected use was never
11 supplied by CPR.
12
13

14 I ask you what kind of credibility is
15 that? They were asked how much did they use the
16 sidings in the past and they lost their records.
17 How much are they going to use the sidings in the
18 future and never have they produced that information.
19

20 The CPR claims they have got to have
21 that marshalling yard and it must be where it is and
22 by the way that term "marshalling" yard, Mr. Allison,
23 a CP Vice President was in Windsor four weeks ago
24 when he said: It is not a marshalling yard. We call
25 it a meeting yard but it is not a marshalling yard.
26

27 We have got a letter written by Mr.
28 Allison to Mr. Fred Burr dated 2 April, 1975, in
29 which Mr. Allison calls it a marshalling yard. If
30 that is a good enough term for the CPR then it's good



BB 9

1 enough for us, but why did he call it a marshalling
2 yard in 1975 and then turn around in 1977 and say
3 that is not a marshalling yard. What kind of
4 credibility is that?

5 They say they must have it and it must
6 be where it is. Would the Powell marshalling yard
7 be less indispensable in a more suitable location?
8 We can show them much more suitable locations where
9 there is nothing around but cows, open fields and
4 10 with as much length as the Powell marshalling yards.
11 There is not even a pedestrian crossing in the way
12 because there are no pedestrians out there and that
13 is just a few miles east of where it was built.
14

15 Mr. Allison even said the other day
16 when he was in town that this controversial walkway
17 was closed for security reasons. Security reasons,
18 Mr. Allison! You closed the walkway because you had
19 to close the walkway on the marshalling yard because
20 the walkway cuts the marshalling yard in two. You
21 broke the law Mr. Allison. Is it really then proper
22 to turn around and say we had the interests of the
23 people at heart. We closed the walkway for security
24 reasons. And CPR claims if you are going to insist
25 on the application we will solve the problems. You
26 cannot solve the problems Mr. Chalmers. The Powell
27 marshalling yard is an environmental outrage and the
28
29
30



BB 10

1 only way you can solve that problem is to move Powell
2 marshalling yard out of there.

3 Good corporate citizenship. Would not
4 a good corporate citizen pay heed to the outcry,
5 realize he has goofed and we all goof from time to
6 time and move, quietly move the marshalling yard to
7 a more suitable location. Not only is that an
8 environmental outrage but even more importantly it's
9 an unacceptable hazard. Powell Sidings in a
10 residential school-park area is unacceptably dangerous.
11

12 Mr. Hibbard admitted that and I'll
13 speak about Mr. Hibbard in a moment but I have one
14 last point about Mr. Allison. He claimed that if they
15 get use of the Windsor Yard -- if they can use the
16 Powell Yard instead of the Windsor Yard that would
17 solve the traffic congestion problems at Tecumseh,
18 one of our busy streets here, but he failed to
19 mention in order to do that, wave his magic wand and
20 solve our problems on the traffic on Tecumseh, he was
21 going to create an intolerable traffic problem that
22 we have seen in the past on Walker and Howard, also
23 two of our busy Ontario roads. Two for the price of
24 one. It will solve it on one street he said but he's
25 going to drop that traffic onto two of our busy streets.
26
27

28 And now Mr. Hibbard. I hesitate to
29 use the word bias. Perhaps I may be allowed the
30



BB 11

1 expression point of view. Mr. Hibbard's point of
2 view is somewhat coloured by the fact that Mr.
3 Hibbard acknowledges that he spent twenty years as
4 a CPR employee. Now I understand that the Chief
5 Inspecting Engineer of the RTC needs some railroading
6 background and I guess it's reasonable to assume that
7 the Chief Inspecting Engineer might have worked for a
8 railroad. Mr. Hibbard did. He worked for twenty
9 years for the CPR.
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CC.1
MJC/ko

1 But does Mr. Hibbard's point of view have to be so
2 consistently coloured by the fact that he worked for
3 CPR for twenty years?

4 At the time this first inspection was
5 carried out we had some questions for him. In fact
6 two or three hours of questions. If you care to, Mr.
7 Chairman, I could document that session we had with
8 Mr. Hibbard. His point of view throughout was that
9 of a CPR man. Not that of an impartial adjudicator
10 which I believe he must be if he is to work properly
11 in your Committee.
12

13 Powell Sidings is a gross injustice.

14 How could the Railway Transport
15 Committee reverse their previous decision? How could
16 they possibly say in April "No. That is an unsuitable
17 location. No to CPR. You can't use those sidings."
18 How could you possibly conceive of reversing your
19 decision and saying to CPR in November or December:
20 "Yes you may use the siding." How could you reverse
21 that decision? Would that be justice?
22

23 Tell us, Mr. Chairman. How do we
24 obtain justice? Has the RTC given us reason to think
25 that we will get justice here?
26

27 Thank you.

28 THE CHAIRMAN: Thank you.

29 FATHER GIROUX: My name is Rene
30



CC 2

1 Giroux. I am a parish priest. I am shorter than this
2 microphone!

3 I am speaking with a sense of -- I
4 think the impression I would like to convey is I
5 think I believe that we have a need in our land for
6 the movement of goods, the movement of traffic.

7
8 However I believe that when we
9 consider this particular service in our communities,
10 we must also consider other facets of the communities
11 and at the last day of the hearing -- the hearing at
12 which I spent, like the two doctors and like many
13 more, closer to one hundred hours when I could have
14 been other places doing other things -- I clearly
15 heard him say it is one thing to build a 1.3 double
16 track siding parallel to the main line in a meadow.
17 It's another thing to build such a facility in the
18 heartland of a neighbourhood community.

19
20 Then he made the remark that he was
21 very very much impressed by the persistence and by
22 the interest and the sense of participation of the
23 people, the residents of the communities. He was
24 heartened by that participation. He found people
25 with a sense of responsibility, with a sense of
26 justice and a sense of courage and I think he was
27 moved by that experience; an experience that he may
28 not experience too often in his role and he did
29
30



1 conclude as well and again as has been repeated
2 before a new hearing should begin, there must be a
3 judgment -- there will be a judgment on costs.

4 Now I am speaking as one who has some
5 education. I do not in any way feel that I have the
6 skills of a lawyer. I don't particularly feel the
7 doctors feel that they have the skills for any of
8 our residents. This is why we feel the need to
9 work with the medium of law and those who have the
10 competence of debating the law but that doesn't mean
11 that we have money coming out of our ears.

12
13 The monies that are gathered are
14 monies that are coming from people who are making
15 some kind of commitment of a dollar, ten dollars,
16 whatever it might be. Other people going around
17 trying to stir up interest and you know as well as
18 I that when you go beyond your own community you
19 are dealing more with apathy than real civic concern
20 and these people have put themselves into a position
21 to experience a great deal of public focus where they
22 can be criticized, where they can be judged and where
23 they can be looked upon as narrow minded and concerned
24 for themselves and not for the overall good of the
25 city or the overall good of our land.

26
27 I really think that this hearing has
28 to address itself to (even if it is going to consider
29
30



1 continuing) to the more basic issue and that is do
2 people have environmental rights and what I see at
3 this stage is -- I don't see what else we can discuss
4 and just to simply go on and repeat -- it is like
5 watching a movie not the first time, not the second
6 time, not the third time and it is watching a movie
7 that is not too exciting either.
8

9 I would like to conclude by making my
10 remark that there was a Grey Cup yesterday and in
11 watching the football game it came to a conclusion.
12

13 I built myself to have an expectation.
14 The game was played. It was over. Everybody was
15 going home. The people from the West went home sad
16 and the people from Montreal, the Alouettes, went
17 home quite happy.

18 My point is that I think we have
19 finished this game and it is a real difficulty in
20 my mind and in the minds of many people and that is
21 is this going to be a ten game schedule or where do
22 we go? Why are we going on and on and on?
23

24 If it is just a question of putting
25 people in the position of being utterly frustrated
26 we could do a very good job because lawyers do have a
27 job. Doctors do have a job. Factory workers have a
28 job and housewives have a job and we all have some-
29 thing to do in the community and if we are going to
30



1 respect that I think there has or must be some
2 definitive decision that allows people to say that
3 justice is done.

4 I really believe that that judgment
5 has already been made.

6 Thank you.

7 THE CHAIRMAN: Thank you.

2 8 MRS. PHYLLIS CHESLEA: My name is
9 Phyllis Cheslea and I live at 2632 Turner Road.

10 THE CHAIRMAN: How do you spell your
11 last name?

12 MRS. CHESLEA: C-h-e-s-l-e-a.
13 Cheslea.

14 THE CHAIRMAN: Thank you. The
15 address again?

16 MRS. CHESLEA: 2632 Turner Road.

17 THE CHAIRMAN: Thank you.

18 MRS. CHESLEA: At the same time
19 about as when Mr. Charron noticed the beginning of
20 the Powell Siding my husband was at the same place
21 and he was asking the workers what they were doing
22 and they wouldn't tell him and he came home and asked
23 me to call City Hall, which I did, the Traffic
24 Department, and they did not know anything about it
25 and I called Mr. Bernard Newman and brought it to his
26 attention and he said he would look into it which
27
28
29
30



1 I believe he did.

2 THE CHAIRMAN: Who was Mr. Bernard
3 Newman?

4 MRS. CHESLEA: Mr. Bernard Newman is
5 our Member of Parliament.

6 THE CHAIRMAN: Oh, I see. Okay. Fine.

7 MRS. CHESLEA: The CPR went ahead and
8 built the Powell Siding without a permit from the
9 CTC and still does not have one.

11 If any of you want to build on your
12 property -- if you want to have a shed you have to get
13 a permit and at the Powell Siding meetings -- I don't
14 know what the date was -- but I was there and I heard
15 Mr. Fisher say that the CPR committed a crime; that
16 they did not have permission to build that siding and
17 if he said it once he said it three times. I heard
18 him and that was his words; that they did not have
19 permission and they broke the law. That was the words
20 used. They broke the law he said and he said it at
21 least three times and the other people that were
22 around that meeting must have heard him.

25 In conclusion these sidings should be
26 taken out and replaced at a more suitable place.

27 We have, besides Powell Siding there,
28 we have Chrysler trains at Walker Road shunting back
29 and forth at intervals of 10 and 12 minutes that
30



1 Walker Road is blocked and ambulances can't get
2 through there and firemen can't get through there
3 and since they stopped going through Turner Road and
4 Memoraial Drive the traffic can't even go around and
5 go through.
6

7 I move for the adjournment until costs
8 are settled.

9 Thank you.

10 THE CHAIRMAN: Thank you.

11 Yes sir?

12 MR. DANTE PELLARIN: My name is
13 Dante Pellarin and I live at 926 South Pacific and
14 most of these gentlemen here, they know where it is.
15 It is about 55 feet from the centre of that main line
16 and right near the corner of Parent Avenue and
17 Walker Road.
18

19 I have my problems as I presume as
20 much as the other neighbours but I just cannot under-
21 stand the way the CPR has been acting and the only
22 thing is I cannot judge myself how can I live in my
23 place and bring up -- and brought up my childrens
24 in the proper manner as a Canadian because I personally
25 am Italian and proud to be Italian.
26

27 The answers the CPR are giving to me --
28 they can't come through with the proper answers and
29 they sent that inspection -- three men I believe from
30





1 CPR to check my house and my house is unbearable. It
2 is unlivable and they admitted that but I say what
3 can you do. They haven't been able to do anything
4 with the water because I am flooded 12 months of the
5 year so here we are facing another application.

6
7 You tell me gentlemen what can I say
8 to my children? What can I say tonight for instance?
9 Can we get an answer today?

10 Well I hope we don't have to use other
11 meetings. I hope not.

12 Thank you.

13 THE CHAIRMAN: Thank you.

14 MRS. SHIRLEY CHARRON: My name is
15 Shirley Charron and I live at 2653 Turner Road.

16 I think you will probably hear from
17 the Turner Road people more on account of the traffic
18 on Walker Road.

19 I realize that you men did not come
20 here -- I see no maps as to the areas or what we are
21 talking about.

22 I would like to ask you a question.
23 Mr. Pellarin almost took the words out of my mouth.

24 The first thing I have on my sheet of
25 paper is what do I tell our boys?

26 We have six boys. I am proud to say
27 that I am a mother to six boys. When these hearings
28
29
30



1 started they were all single. Now one is married and
2 I am a grandmother and hopefully I won't be a great
3 grandmother before this matter is settled!

4 But I will say to the CPR that I will
5 be here even if I have to be a great grandmother
6 because my dad worked on the railroad for 47 years
7 and I am built of the same stock and when you raise
8 six boys and when you live in a house with seven men,
9 believe me, I am here to fight but let me tell you
10 this first.
11

12 I will tell you what happened and I
13 want you to be really serious and think of this when
14 we are passing this to the next generation. When I
15 say what will I tell my boys I am being very serious.
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Our youngest is in Grade 9 at Walkerville. They are taking the judicial system of Canada. In last week's paper after Mr. Fisher re-applied it went on about the CP's lawyer said to Judge so and so said this, and then CP's lawyer said this and then it was -- he finally said to me at 14 years of age, he said well who's on whose side? Then he said to me, but are CTC honest?

So when you listen to all the testimony, and I will be back telling you about the dirt on my front porch, how sick and tired I am of dusting two and three times a day to try to keep the house clean with six engines or three engines, I do not care how many engines idle down there. But I want you to think of what my boy said to me.
"Are CTC honest?"

What can we answer our boy? What can we answer our children? We have been back and back and back and they have been. I would say that we have given one hundred to two hundred hours of our spare time. Lawyers are busy, I agree. Don't ever think for one minute that housewives aren't busy. We are just as busy but we will be here too.

I would just also like to add for every senior citizen here, would you please remember there are probably ten at home that cannot make it.



DD-2

1 And you do not even have maps of that but I would
2 say within 50 feet is a Senior Citizens complex
3 sitting right there. I do not know if anyone is
4 even going to mention them. But remember it's a
5 bad day, it's hard for them to get out. But I hope
6 nobody is going to forget and that's what I would
7 ask you, to consider those senior citizens but
8 also think it over and really think can we go home
9 and tell our children.
10

11 Thank you.

12
13 THE CHAIRMAN: Thank you. This really
14 has nothing to do with this hearing but I just
15 thought I might mention that I have to live in a
16 house with a wife and four daughters and I do not
17 stand a chance.

18 Who is our next participant?

19
20 MR. KEN MORRIS: My name is Ken
21 Morris and I live at 2760 Grand Marsh Road East. I
22 have been pretty well very much a part of these
23 hearings right from the start. My property backs
24 right onto the Powell Siding.

25 Now we start talking about bias, maybe
26 I'm wrong, maybe I do not even know the definition
27 of the word. But I always get the feeling that I
28 am a little man fighting a big company, and that to
29 me is bias enough.
30



DD-3

1 I was very bitter when they started
2 putting the siding in in the first place. In fact,
3 at the first hearing I received a nickname which has
4 stuck with me ever since, Molotov Cocktail Morris.

5
6 I was advised that this was a
7 procedure. But I wonder sometimes, was I wrong. I
8 listened to the citizens and they said don't do it,
9 but I wonder sometimes. Other than that I cannot
10 really add much to what the doctors and other
11 citizens have said, but I feel that if there is any
12 bias the fact that we are David fighting Goliath is
13 one.

14
15 And as far as an adjournment, I do
16 not even know if that's right. I feel that the
17 decision has already been made by Jones and LaBorde.
18 I think what we should do is accept their decision.
19 I think there is very little more than that I have to
20 say. Thank you.

21
22 THE CHAIRMAN: Thank you Mr. Morris.

23 MR. O'CONNOR: My name is Daniel
24 O'Connor and I live at 2564 Bing. I submitted a
25 letter on the Powell Siding on October the 19th, 1974
26 which the CTC acknowledged the receipt of a copy and
27 also CPR.

28
29 THE CHAIRMAN: What was that date
30 again?



DD-4

1 MR. O'CONNOR: October the 19th, 1974.

2 THE CHAIRMAN: Thank you.

3 MR. O'CONNOR: Oh pardon me, 1977, I
4 cannot read my own writing, the Powell Siding on the
5 main line of the Canadian Pacific Railroad between
6 Walker Road and Howard Avenue in Windsor, Ontario.

7
8 At a previous hearing of the CTC a
9 decision was handed down denying CPR the right to
10 use the subject siding because of obstructions to
11 pedestrian roadways, which had been granted to the
12 former Township of Sandwich East in a letter
13 that I think goes back to 1971.

14
15 The CPR constructed the Powell Siding
16 illegally without the request of a building permit
17 from the City of Windsor. As a citizen in the City
18 of Windsor if I made such a construction I would be
19 asked to remove it. And I think on that basis that
20 the CPR should be asked to remove the Powell Siding.

21 Public hearings were never conducted
22 before this siding was constructed. And, as a
23 matter of fact, it was practically in operation
24 before anyone knew what the purpose of this siding
25 was going to be. Well I have lived in the
26 neighbourhood for about 25 years and I feel that the
27 Powell Siding, if it is allowed to be re-opened,
28 will increase the range of noise, pollution,
29
30

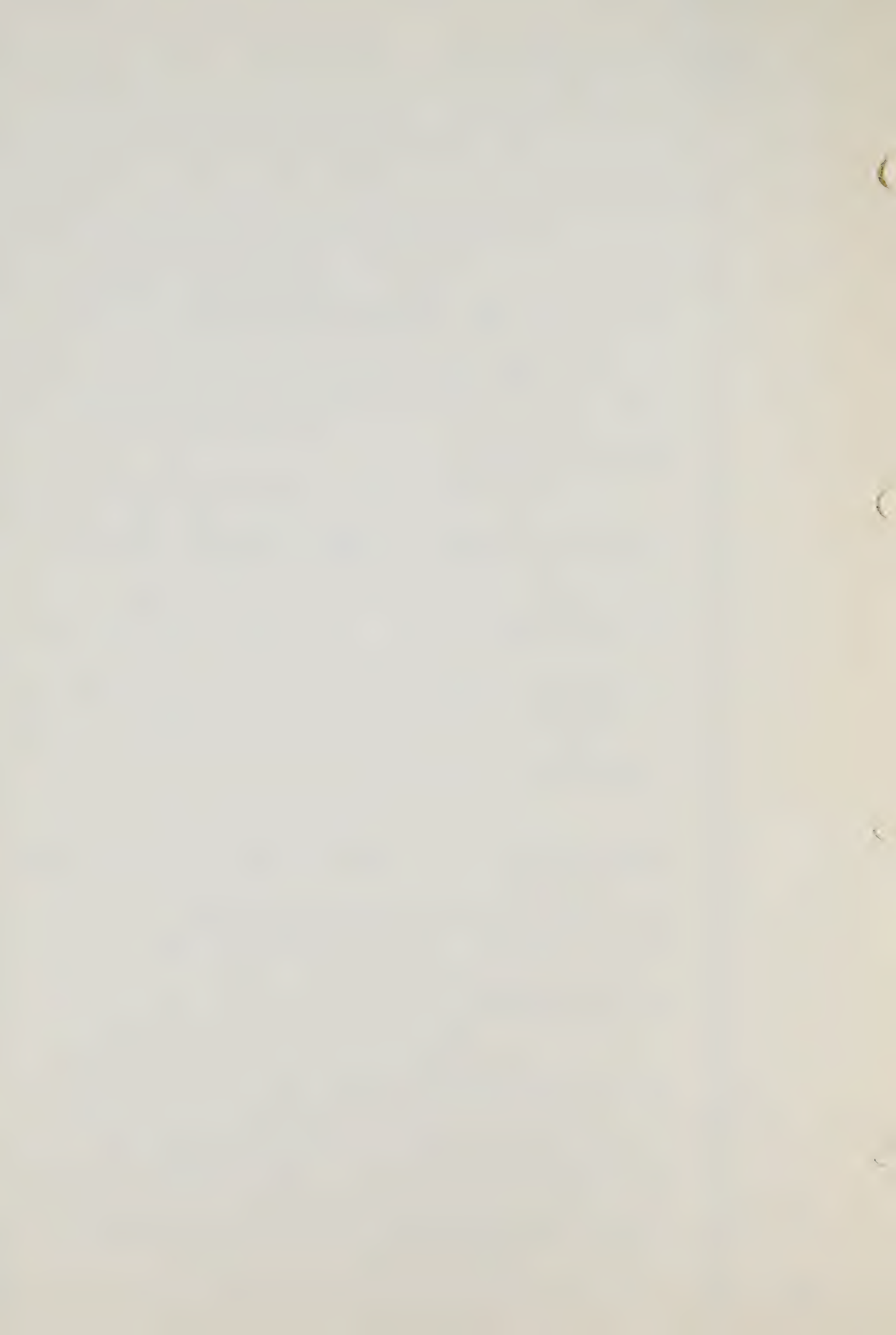


DD-5 1 vibration from diesel engines that run for long
2 periods of time. And parallel to the CPR property runs
3 high tension towers which create, which could create
4 a disaster in the event of a derailment. As these
5 towers carry high voltages and could topple on cars
6 or tankers carrying inflammable products, as has been
7 proven in the past, were allowed to stay on the siding
8 when it was open.
9

10 Then there is the matter of St. Andrew's
11 School which my three children attended, which has
12 more than 100 students, which is only a couple of
13 feet from the CP tracks. The playground extends to
14 Memorial Drive which runs parallel with the tracks.
15 And standing trains create a safety problem as well as
16 an environmental problem..
17

18 In view of the number of derailments
19 there have been in the past, it was only in the recent
20 past there has been a couple of derailments in the
21 City of Windsor. It is not inconceivable that the
22 derailment could have happened in this area.
23

24 Memorial Park also runs adjacent to
25 the railroad tracks. It is a prime recreation area
26 in our community and would be threatened by noise and
27 pollution and picnics and softball and other sporting
28 events become less enjoyable if CPR is permitted to
29
30





DD-6

1 reactivate the Powell Siding.

2 I protest the new application of CPR
3 for another hearing to re-open the Powell Siding.
4 And I strongly urge the Canadian Transport Commission
5 to deny the attempt by CPR to downgrade our
6 neighbourhood, as well as devalue our properties.
7 I strongly urge the Panel to uphold the previous
8 decision. And I move that an adjournment be made in
9 this case until costs are assessed. Thank you.
10

11 THE CHAIRMAN: Thank you, sir.

12 MR. BARKER: Mr. Chairman, my
13 objection to this siding ---

14 THE CHAIRMAN: Would you identify
15 yourself first, sir, please?

16 MR. BARKER: My name is Harold Barker
17 and I live at 2512 Windemere. I have lived there
18 for 28 years.

19 My objections to these Powell Sidings
20 being extended to what would constitute a marshalling
21 yard are based on three phases. The first the
22 interference with traffic. There has always been the
23 problem for vital traffic getting from the city to
24 the northern limits of the city.

25 There were in the past three main
26 arteries, namely, Ouelette, Walker Road, Howard Avenue
27 and Dougall. That's going from east to west.
28
29
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DD-7

1 THE CHAIRMAN: Duval?

2 MR. BARKER: Dougall⁸ as in Scotland.

3 And one of these roads has already been closed by,
4 I take it, the Transport Ministry to facilitate the
5 extension of the airport.
6

7 That brings us back to the most
8 easterly one which is practical, Walker Road, which
9 is at the eastern end of the Powell Siding. Then
10 we go a mile and a bit. I am not quite sure how many
11 kilometers that is, and we come to Howard, another
12 important north and south artery.
13

14 Now this is already overloaded having
15 to be widened to facilitate present traffic.
16 Dougall which is further west can be written off as
17 being almost congested. So that leaves us with
18 Walker and Howard to handle vital traffic going north
19 out of the city.. Fire engines and ambulances, these
20 on occasions in the past have been held up, not for
21 a few minutes, for many minutes.
22

23 Many of the holdups have been
24 up to a duration of an hour. And I know this from
25 practical experience on one occasion where police
26 cruisers had to turn out of the stream of congested
27 traffic to make an alternative route one way or the
28 other, east or west. Now lives could hinge on this.
29

30 This was complicated more when the



DD-8

1 sidings were being used. And we can expect a
2 tripling of these incidences in, if they are
3 continued to be allowed to be used.

4 Continuing then along the section of
5 the Powell Siding, as has been mentioned before, we
6 have a school, a primary school. Small children
7 playing in the vicinity of the trains, their
8 safety is going to be jeopardized by shunting and
9 switching and stationery box cars with certain
10 traffic coming through. These box cars or
11 tankers possibly and probably do contain inflammable,
12 toxic chemicals, quite apart from the hazard and
13 disruption if a box car is tipped over, hits a
14 panel and causes electrical danger.

15 All right, proceed a little further
16 west, we come to Memorial Park. Of course we are
17 going by residential houses all the time, residences,
18 no commercials, no industrials, everything
19 residential. We come to Memorial Park where there
20 is probably the last decent stand of hardwood
21 timber standing within city limits out in Hickory,
22 a very fine stand which has been very carefully
23 tended by the City.

24 They are threatened, obviously, by
25 the emissions, the exhaust fumes from diesel engines
26 idling in the vicinity over a period of hours.
27
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DD-9¹

A little west of that recreational area, again for children and junior sports, which is also being carefully tended and has been donated, the facilities have been donated by service clubs.

This is an additional threat because, as you know, trucks are an attraction to children. They are inquisitive and they could be involved in accidents.

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Now as far as that goes I think that sums up everything that is dangerous for the situation in that area except the fact that this is the only piece of residential area backing onto the CP tracks in the City of Windsor. I do not know how you gentlemen came in here today or yesterday, probably by air. If you did, you could possibly have seen from the plane the layout of the tracks passing through Windsor and its environs. Our eastern limits are coming in from Tecumseh and it passes through large areas of undeveloped land. It passes through an area which has been developed commercially and industrially. There are sidings on that east side in existence now. There is room for other sidings.

Then we jump the area in dispute to the western side from Parent Avenue, possibly up to the river. In that area it is commercial and industrial. There are already tracks there. There is room for more tracks.

When you get close to the river there has been an industrial development in force there which has lots of room for many more tracks and they are going to have to put tracks in there for the factories and silos et cetera that are being built in that area. Yet when you think of this the whole of the CP environs to its tracks from east to west



1 there is one section, I think it is 1.1 miles known
2 as the Powell Sidings which was a single track until
3 CP put in two illegal tracks, one on each side,
4 threatening the area. They had to choose that one
5 stretch out of the whole stretch through Windsor.
6 Now this seems to me if not absurd hopelessly insane
7 and absolutely unjustified.
8

9 Finally, I get a bit emotional about
10 this sometimes and I am a little bit now but I get
11 worked up to the point where I sit and look at the
12 TV at nights as you probably do sometimes when you
13 have time and some idiot leans out of that tube and
14 says to me like some paid notoriety: Remember, remember
15 what we do is with you in mind. Do you think I
16 believe that. I think they should be ordered not
17 only to stop using the tracks but to take the two
18 extra ones they put down illegally and clear out to
19 an industrial or commercial area.
20

21 Thank you.

22 THE CHAIRMAN: Thank you sir.

23 MRS. ASMAR: My name is Beatrice
24 Asmar and I live at 2588 Shelburne.
25

26 THE CHAIRMAN: How do you spell your
27 last name?

28 MRS. ASMAR: A-s-m-a-r, and I am not
29 very far from the CPR track.
30



1 THE CHAIRMAN: Just a moment. Perhaps
2 we could adjust that microphone. It will be more
3 comfortable for you.

4 MRS. ASMAR: I had in mind to say many
5 things but people before me have already said it so
6 there is no sense in repeating it.

7
8 One thing they have not touched on is
9 since those two tracks have been put in alongside the
10 main line it has loosened up the ground to the point
11 where the tremors are unbearable and the damage to
12 our houses in the neighbourhood is just beyond every-
13 thing. You should come and see the cracks in the
14 drives and the walls and the windows vibrating and
15 it is very nerve racking. It is just playing havoc
16 with us. We just dread what will happen if they allow
17 the CPR to open those two lines and they will go ahead
18 and put in more lines which they are bound to do.

19
20 They do not care about anybody in the
21 neighbourhood but only themselves. Something has got
22 to be done immediately to keep this from happening.
23 This is a residential area as has been said before.
24 There is a school there. I have raised five children,
25 three of them attended that school and I thank God
26 they are no longer there because I hate to think what
27 might happen one day. So please gentlemen, consider
28 and consider it as if you were living right there
29
30



1 before you allow the CPR to go on with what they are
2 doing.

3 Thank you.

4 THE CHAIRMAN: Thank you.

5 Do we have any further members of the
6 public who wish to make representations?
7

8 I guess I did not count too well this
9 morning. I counted eleven and we have had twelve.

10 Yes, sir, come forward please.

11 MR. NEWMAN: My name is Bernie Newman.
12 I am the Member of the Legislature representing both
13 sides of the railway tracks.
14

15 I have the distinct pleasure of
16 representing that area for now some 18 plus years.
17 In all of my days in the Legislature I have never
18 seen constituents get together in opposition to a
19 project as they have during this time and they did
20 come together because of the injustice that has been
21 imposed upon them by a Goliath. This is a battle
22 between David and Goliath. We hope that you
23 gentlemen there will see just what is happening.
24

25 The residents on both sides of the
26 track, that is the Remington Park to the south end
27 and the Walker residents to the north end of the
28 tracks are peaceful, law abiding -- I would not say
29 outspoken but the citizens of the highest calibre.
30



1 They would never under any circumstance object to
2 anything that would have been done legally and within
3 the law, but in this instance we have CPR, without
4 employing or entertaining any environmental impact
5 studies, impose their will on the two communities.
6 We in the Legislature have legislation that would
7 require impact studies except it has no bearing on
8 a body controlled by Federal jurisdiction and that is
9 very, very unfortunate because you can rest assured
10 that if the Ontario Legislature had some power over
11 the actions of the CPR those of us who are citizens
12 concerned would have objected very very violently.

14 Now, there was another thing that I
15 wanted to bring to your attention -- oh, I live in
16 the vicinity. I am approximately 1,000 feet from the
17 railway tracks yet the windows in my home even shake
18 when you get these extended 100 plus -- I think it is
19 100 plus -- units passing by on a regular basis. Even
20 aircraft going overhead and we seem to be off the
21 flight path, but whenever the aircraft going overseas,
22 the heavier DC-7's that come into the Windsor Airport
23 and the L-1011's, they cause an awful lot of noise
24 and they do have some environmental effect, but the
25 use of the Powell Sidings -- not the Powell Sidings
26 but the main line, causes sufficient problems to the
27 people in the neighbourhood.



1 If you triple track the area you are
2 going to only triple the problems involved. The
3 argument has been made already that CP erected the
4 siding without the authority of the CTC. You know,
5 if I were to try to cut a tree down in my backyard I
6 would have to get all kinds of permission. Yet, CPR
7 went ahead and did just as they pleased. In other
8 words, they are the one that are going to tell you
9 people just exactly what they should or should not do.
10 I certainly think and hope that you gentlemen in your
11 wisdom will see how this has affected a neighbourhood
12 and has affected it to the point that the Remington
13 Park side would have been developed years earlier
14 except that the builders hesitate to go into any
15 extensive housing development because it would be
16 difficult to sell the housing even though housing is
17 in short supply in the community.

18
19 Mr. Chairman, I hope you gentlemen
20 will understand the people that are here today would
21 probably have been five times greater in number were
22 it not for the weather and not for the fact that this
23 hearing is being held in the cold weather months
24 rather than being held for the convenience and at
25 the convenience of the residents in the area. Surely
26 people come before trains.

27
28
29 I ask you to think it over very
30



1 seriously and see how the people have been affected
2 and the additional effect it is going to have on the
3 environment in the area.

4 The park, when I first moved into the
5 area, was a fairly heavily wooded area. As a result,
6 I think it is partially as a result of the pollutants
7 from the trains that the park now is losing sub-
8 stantial numbers of trees. It loses a number each
9 year and if CP is allowed to triple track you can
10 rest assured what is left as far as the trees are
11 concerned will not last much longer. Please consider
12 the public in preference to the CPR.
13

14 Thank you very much.

15
16 THE CHAIRMAN: Mr. Newman, before you
17 leave, I wonder if you would mind taking three or
18 four minutes to tell me how your provincial environ-
19 mental legislature works.

20 MR. NEWMAN: It does not affect the
21 Federal animation at all.

22 THE CHAIRMAN: I realize that.

23
24 MR. NEWMAN: Before any type of
25 development can take place there are environmental
26 impact studies done and they have to be conducted.
27 Public hearings are held and the public has the
28 opportunity to make input and if they are going to
29 be adversely affected then it is entirely up to the
30



1 body that is sitting and hearing to finally weigh
2 both sides of the argument and decide as to whether
3 they are going to permit that type of construction
4 and so forth to take place.

5 THE CHAIRMAN: All right, thank you
6 very much.

7 Are there any other members of the
8 public who wish to come forward?
9

10 I think this would be an appropriate
11 time for us to take a ten minute break.

12 -- Brief recess
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FF-1
MJCEg

--- On Resuming.

THE HEARING PROCESS OFFICER: Order,
please.

THE CHAIRMAN: Please be seated.

MR. BILL SCHMIDT: My name is Bill
Schmidt. I know that it is out of line for me but
I thought I would like to speak after Mr. Newman
got up here. I have been a resident living at
2686 Bing Road approximately 100 feet or so away
from the infamous Powell Siding.

I really don't know what to talk about
as far as being prepared but I feel that since there
are not many young people of my -- I am 20 years old --
I felt that I should come up here and speak as best
I know how on behalf of the young people of this
country and of our community.

I am not really involved but I will
be because I have seen what is going on here today.
I live on a very basic principle of truth and
justice and I believe that what CPR has done is
flagrantly misused and manipulated our lives.

I really do not see or -- pardon me.
I don't think the executives of CPR have taken upon
themselves to downgrade our neighbourhood. I have
gone to St. Andrew School for my education for what,
nine years. I have played in the playground when



Schmidt

FF-2

1 I was much younger in Memorial Park and I really
2 cannot understand such idiotic and stupid violations
3 of just a basic life.

4 When people come home they do not
5 expect to have their windows rattling or to see
6 their aluminum siding which they have paid so much
7 money for get black and dingy and I kid you not..

8 Now I would like to see, Mr.Chairman,
9 a governing body stand up to these people. I would
10 like to see them stand up to them. I am a very basic
11 man and I would just like to see that the principles
12 of justice and truth be carried out. I know I
13 speak (and I don't think there are very many people
14 of my age around here) but in the sixties when there
15 was very very much information and radical
16 procedures by my age group in the sixties about
17 environment, pollution or whatever, but I think it
18 is high time that we get back -- maybe not to the
19 same extent as the radical procedures in the sixties --
20 but the same concerns that the people were going
21 overboard about in the sixties and I think this
22 should continue on as soon as the so-called
23 civilized society of ours can stand up to people
24 who misused the laws of our country.

25 Now I don't know the words in these
26 transcripts. I know a couple of people that do. I
27
28
29
30



FF-3

1 cannot understand why a new Tribunal has come before
2 us. I really can't understand because it is one
3 thing to even read and it is another thing to hear
4 the people that have been talking in all of these
5 transcripts and I don't think you can fully grasp,
6 with all due respect, what has been in these
7 transcripts.
8

9 Now I think that fining them would
10 not be enough because the CTC has not deemed fit to
11 fine them as somebody previously said \$200 a day
12 because that would be like slapping a spoiled child's
13 wrist, your Honour, because they are trying to put
14 themselves, CPR that is, in a position to get a
15 little bit of sympathy. Through articles that I have
16 read in the paper (which most of the people here I
17 hope have read) such idiotic things of CPR being,
18 oh, in a financial position, you know, where they are
19 not doing so well and whatnot and I really don't
20 think that they're having that much problem.
21
22

23 I think a lot of people that live on
24 a factory salary -- I am presently employed by
25 Chrysler of Canada but I will be going back to school
26 in January. I think they live on a factory salary
27 and I don't think CPR can sing the blues as much as
28 they do.
29

30 I really do not see the point of this



FF-4

1 whole hearing. I ask that there be an adjournment
2 until cost has been completed and one last thing.
3 I don't consider myself a very good speaker, very
4 learned being a factory worker as such but it makes
5 me really wonder sometimes, you know, the person as
6 I am, whether the powers in the hands of the few
7 wisdom in the minds of none.
8

9 Thank you. I wish you to be truthful
10 and just.

11 Thank you.

12 THE CHAIRMAN: Thank you.

13 Yes sir. Please come forward.

14 MR. ANGUS BEORGEAU: Thank you, sir.

15
16 My name is Agnus Beorgeau and I live at 2279
17 Shillbrook and I would address your Committee as
18 President of the St. Andrew's Parent Teachers
19 Association.

20 It was not my intention to say
21 something to you, sir, as I felt I would only be
22 repeating what has already been said.
23

24 However, the parents of the area have
25 asked me, as their President, to say a few words to
26 your Commission.

27 I wrote your Commission in care of
28 Mr. d'Avignon in the latter part of October this year
29 outlining the reasons why the PTA felt that this
30



FF-5

1 siding should remain closed. I assure you that the
2 statements in my letter are true and they consist
3 primarily of having talked to the teachers and the
4 principal of the school who assure me that while the
5 trains are idling on the siding it's virtually
6 impossible for the teachers to teach the children.
7 We would ask you, sir, perhaps you noted this
8 morning that there were some young children sitting in
9 the back of the room. They, like their parents, have
10 exhibited frustration and cannot understand why a
11 new Committee has met.
12

13
14 We would ask you, therefore, to
15 consider our petition and have this meeting adjourned.

16 Thank you, sir.

17 THE CHAIRMAN: Thank you. Are there
18 any others?

19 Now is the opportunity.

20 Mr. Chalmers before you start speaking
21 on behalf of CP I thought I would address a question
22 to Mr. Paroian and Mr. Fisher.
23

24 I wonder if you could tell me what
25 actual steps you are taking in relation to the
26 Federal Court this week?

27 MR. PAROIAN; Yes sir. Forgive me if
28 I am not as knowledgeable on this. I have been
29 away on vacation and Mr. Fisher has done an able job
30



FF-6

1 of handling that while I was away.

2 We have filed a Notice of Appeal --
3 served but not yet filed, I believe, the Notice of
4 Appeal taking the matter to the Federal Court.
5 Because we have been involved in the preparation for
6 this particular day and this particular proceeding
7 we had not, and because we only got the Decision on
8 Wednesday, we have not yet filed a memorandum of
9 fact and law which we would do on an abridged basis.
10

11 We would give you an undertaking or
12 I would suggest that we give you an undertaking to
13 do that on an abridged basis if you were considering
14 granting the adjournment and you are at all
15 concerned about any dilatoriness on our part.
16

17 THE CHAIRMAN: Well, no. I wasn't
18 thinking of that. I wondered if you were making an
19 ex parte application for a stay or anything of that
20 nature?
21

22 MR. PAROIAN: That has not yet been
23 done but I should tell you very honestly that that
24 matter, I believe, should be considered only after
25 we have a decision from you, from your presently
26 composed Committee and may be necessary at that time
27 for us to consider what we are doing.
28

29 We have not made an ex parte application
30 and I would not make an ex parte application either



FF-7

1 I might say.

2 THE CHAIRMAN: What you are doing at
3 the moment is appealing from the --

4 MR. PAROIAN: Yes.

5 THE CHAIRMAN: Mr. Justice Mahoney's
6 Judgment?

7
8 MR. PAROIAN: Correct and that is
9 under active movement and I want to make it clear,
10 however, as to the ex parte motion -- it is our
11 belief that it would be in the best interest of all
12 parties to renew our application for an adjournment
13 pending that appeal before this Committee which has
14 jurisdiction, of course, to grant that and pending
15 on what decision you make I guess we will have to
16 respond to it with the alternatives that are
17 available to us.

18
19 THE CHAIRMAN: Well, I thought it was
20 useful for us to know exactly what your plans were
21 and I thought also Mr. Chalmers would also like to
22 know before the argument.

23
24 MR. PAROIAN: Well my reaction (and
25 this is not a definitive statement on my part and I
26 don't want to be) but my reaction is that we are
27 obviously going to have to consider what we are going
28 to do at that stage and it may very well be that we
29 will want to take some proceedings.
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FF-8

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I don't want to be couching my answer in any way. We Haven't done anything yet. We are considering it.

THE CHAIRMAN: That is quite all right. That's quite all right. Thank you.

Mr. Chalmers?

MR. CHALMERS: I am very much obliged to you, Mr. Chairman. Naturally we have other counsel standing by to deal with any Court proceedings that may be brought should such proceedings be brought and should you, sir, wish to continue this hearing as I would hope that you would until actually ordered by a Court not to if you ever are.

Now may it please the Commission I am very glad that you allowed the members of the public not represented by counsel to speak as you did, sir.

I don't think they understood that Canadian Pacific had, earlier on, through myself sought to agree to that going on.

I think it is important coming into this proceeding now you get, with great respect, a full flavour of it as you have in the last couple of hours.

I know that you will be impressed by



1 the sincerity of the people concerned and by the
2 articulate manner in which great many of them have
3 presented a very real interest and point of view.

4 Mind you I can't help saying that
5 there is a sense -- I don't want to sound like a
6 tricky lawyer -- but there is a sense in which
7 Canadian Pacific relies on that. It must, with
8 great difference, be obvious to everyone that
9 Canadian Pacific wouldn't come running back to
10 Windsor knowing full well what it is running back
11 into if it didn't feel, rightly or wrongly and that
12 is for you to decide, -- it wasn't of the view that
13 it had to do what it has to do. It had to have
14 Powell Siding and it have to have it where it was and
15 to get on with the job of getting the authority to
16 do that.

17 Obviously that is not a decision which
18 a great corporation, however Goliath like it is takes
19 lightly to go back into a vortex like this but we
20 have done it and we are here and we are here for good
21 solid transportation reasons which we hope to explain
22 to you.

23 Now to deal with my friend's three
24 points. I am obliged to Mr. Paroian for setting
25 them out in this very straightforward manner. They
26 have three motions rolled up into one which is also



1 expeditious in terms of using the Commission's time.

2 First of all they are making, what
3 I take it to be, their timely objection to your
4 proceeding on the basis of bias, of course, they
5 would be very remiss if they didn't do that if
6 they ever hoped to challenge your proceedings on the
7 basis of bias later.
8

9 I respectfully submit that they have
10 misconceived what bias is about. If they had some
11 basis for saying that one of you gentlemen or more
12 of you as individuals ought not to be sitting on
13 this case or something like that, they would be
14 alleging bias which they might well say avoided the
15 entire proceedings in the way that the Seafarer's
16 International Union long ago kept alleging bias
17 by the Canada Labour Relations Board because Mr.
18 Mosher belonged to one of the trade unions with which
19 they were fighting and always sat on their cases in
20 the CLRB. That's the sort of thing -- that is what
21 bias is about.
22
23

24 Of course the test that my learned
25 friend gave you is quite right. It is simply an
26 adoption of the test in the Supreme Court of Canada
27 case of Szilard and Szasz, 1954 Supreme Court
28 Reports, page 3, where the Judgment of the Court is
29 given by Mr. Justice Rand and it is an arbitration
30



1 but the principles are the same;

2 "The arbitrators are to exercise their
3 function not as the advocates of the
4 parties nominating them and fortiori
5 of one party when they are agreed upon
6 by all but with as free
7 independent and impartial minds as
8 the circumstances permit.
9

10 "

11 In particular they must be
12 untrammelled by such influences as
13 to a fair-minded person which would
14 raise a reasonable doubt of the
15 impersonal attitudes which each party
16 is entitled to."
17

18 But that, sir, is a duty which falls
19 upon each Commissioner.

20 The Committee has its statutory duty
21 under the National Transportation Act and the Railway
22 Act.
23

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NG/ko

1 And the Committee appoints, is involved in the
2 transportation life of Canada. And I will come back
3 to that under other headings. And the Committee has
4 to work with those statutes as it is required to do
5 by Section 3 of the National Transportation Act. And
6 in doing so it may be felt that Parliament was wrong
7 to constitute a transportation tribunal, perhaps there
8 may be a view that there should be something like the
9 Ontario Municipal Board at the Federal level but
10 there isn't. These are transportation tribunals and
11 if that constitutes bias that's too bad. Or if the
12 concern for transportation necessities constitute
13 bias in some way, that's inherent in the legislation.
14 In other words one cannot get into a situation where
15 you can say the Canadian Transportation Commission
16 as a whole is biased. That's a circular argument
17 and that falls on its own weight.

18 /have
19 My friends may simply put the argument
20 wrongly. I do not think they have. They have tried
21 to apply to the whole institution of the CTC the
22 criterion of bias. They may feel, and very sincerely
23 feel that in some fashion the institution is biased
24 against the people they represent by definition. But
25 that they misconceive whatever arguments they may
26 have, with the greatest of deference to them.

27 This is an argument saying that this
28
29
30



GG 2

1 Panel should not sit. It is not an argument to say
2 that CTC should not entertain this case because of
3 bias. You will have to, if you think through what
4 would happen, if they are right and you hear the case
5 they seek to have your finding quashed because the
6 CTC was biased. The normal result of that, of a
7 quashing jurisdiction being exercised, is that you
8 have a new hearing.
9

10 Well, who is going to have a new
11 hearing? It has got to be the CTC, that's the only
12 body that Parliament has set up to hear it. So I do
13 submit that the bias argument is insubstantial.
14

15 Now I am opposed to the motion of an
16 adjournment in these particular circumstances. You
17 do have a discretion. As one of the objectors I
18 believe one of the people who spoke from the floor
19 pointed out to you, you can adjourn it and I do not
20 dispute that. In addition you have the discretion to
21 refuse to adjourn. My learned friend Mr. Paroian
22 was quite vehement about never having been refused
23 adjournments. Well he is very lucky, I have been
24 refused adjournments. But in the case of Wardair and
25 the CTC, which the Commissioners may well be very
26 familiar with, reported in the 1973 CTC Report at
27 page 211 of the Decision of Mr. Justice Walsh in the
28 Federal Court of Canada, it was held to be a
29
30



GG 3 1 jurisdiction to refuse an adjournment in circumstances
2 very similar to this.

3 And Wardair sought a prohibition to
4 the CTC following a refusal to adjourn a hearing.
5 And there had been a previous proceeding by Wardair,
6 presumably by way of prohibition which Wardair had,
7 just as here, proceeded to appeal to the Federal Court
8 of Appeal and Wardair wanted the hearing adjourned
9 pending the outcome of the appeal from the
10 prohibition. And Mr. Justice Walsh, at page 217
11 in holding that the Committee was entitled,
12 Commission were entitled to refuse the adjournment
13 said: "What the Applicant is seeking to do is to use
14 a writ of prohibition to obtain a stay of execution
15 of the judgment which is under review and appeal
16 because there is no procedure in the rules of this
17 court for such a state."

20 In other words this was an answer to
21 the proceeding that my learned friends are talking
22 about bringing. And I commend this case to their
23 attention. Because discussing this case with my
24 own colleagues we more or less came to the tentative
25 conclusion, subject to what the Federal Court may say
26 if they do proceed, that ^{/there} isn't the stay of execution
27 jurisdiction in that court, I would remind my learned
28 friends that that's a statutory court, it is not an
29
30



1 inherent jurisdiction. So no doubt they can apply
2 their minds to that problem. But I rely on the
3 Wardair case as authority for the proposition that
4 you do have the right to refuse an adjournment.

5 Now it is my submission that in the
6 particular circumstances of this case you should
7 refuse an adjournment. To put the matter very frankly
8 what's involved in the present proceeding, which is
9 part way instituted in the Federal Court of Appeal.
10 And my friend has admitted what I did not know, that
11 the Notice of Appeal which was served on me has not
12 been filed in the Federal Court. I do not think
13 service on me really gets them there. But be that as
14 it may, that Appeal, as I understand it, is an Appeal
15 which I would with great respect would submit was a
16 frivolous appeal from a vexatious motion.

17 The essential point in the motion
18 before Mr. Justice Mahoney, and I believe you now
19 have, with the greatest of courtesy to my friends,
20 you now have both the Reasons for Judgment of Mr.
21 Justice Gibson last summer and the Reasons for
22 Judgment of Mr. Justice Mahoney this week, this past
23 week.

24 It seems to me that the course of
25 proceedings are not identical but the substance of
26 both is that the objectors want, notwithstanding the
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1 hard things we have been hearing about them this
2 morning, the objectors want Mr. Jones and Mr. LaBorde
3 and no one else. They want them back. Well they have
4 tried that out twice in the Federal Court. And it is
5 perfectly true that they have proceedings in the
6 Federal Court of Appeal from both of them.

7 But the one from Mr. Justice Gibson,
8 I think if they really wanted to bring it on maybe it
9 could have been brought on to the Federal Court of
10 Appeal. But they did not do anything about that.
11 But in any event they had two licks at that. The
12 first time they appealed from the Order of Mr. Justice
13 Gibson to your Commission, most understandably though
14 naturally Canadian Pacific was not happy about it,
15 adjourned sine die the second hearing about costs.

16 We now have the amusing result that
17 Mr. Justice Mahoney says that I was right to argue
18 against your Commission in the Federal Court that
19 there was a Decision, that the disagreement with
20 Messrs. Jones and LaBorde constituted a Decision
21 dismissing the Application for Costs. In any event
22 that's a digression.

23 You really got a proceeding directed
24 to Messrs. Jones and LaBorde, something that's
25 essentially now vexatious after they tried it out
26 once before Justice Gibson, and I should have thought
27
28
29
30



1 that the second appeal, while presumably both might
2 ultimately be argued together and might ultimately
3 succeed was fundamentally vexatious if you consider
4 what they are saying on the adjournment point
5 fundamentally is that if you can never stop giving
6 these adjournments pending prohibition they can always
7 bring about, they can always get an adjournment.
8

9 There has got to be a point at which
10 you stop granting these adjournments pending appeal
11 of prohibition orders that have been dismissed. And
12 my submission is that you have done it more than once
13 and the point has been reached where one should call
14 a halt.
15

16 THE CHAIRMAN: Mr. Chalmers, in the
17 first instance wasn't the Application dealing purely
18 with the matter of obtaining a Decision on costs,
19 whereas we are now concerned with the matter of merit.

20 MR. CHALMERS: That's right.

21 THE CHAIRMAN: Is there not a
22 distinction there?
23

24 MR. CHALMERS: There is a distinction
25 but I submit that there is a distinction because the
26 essence of the argument before Mr. Justice Gibson was
27 that the Panel which decided the question of costs
28 should be Mr. Jones and Mr. LaBorde. And the essence,
29 I think, of the argument before Mr. Justice Mahoney
30

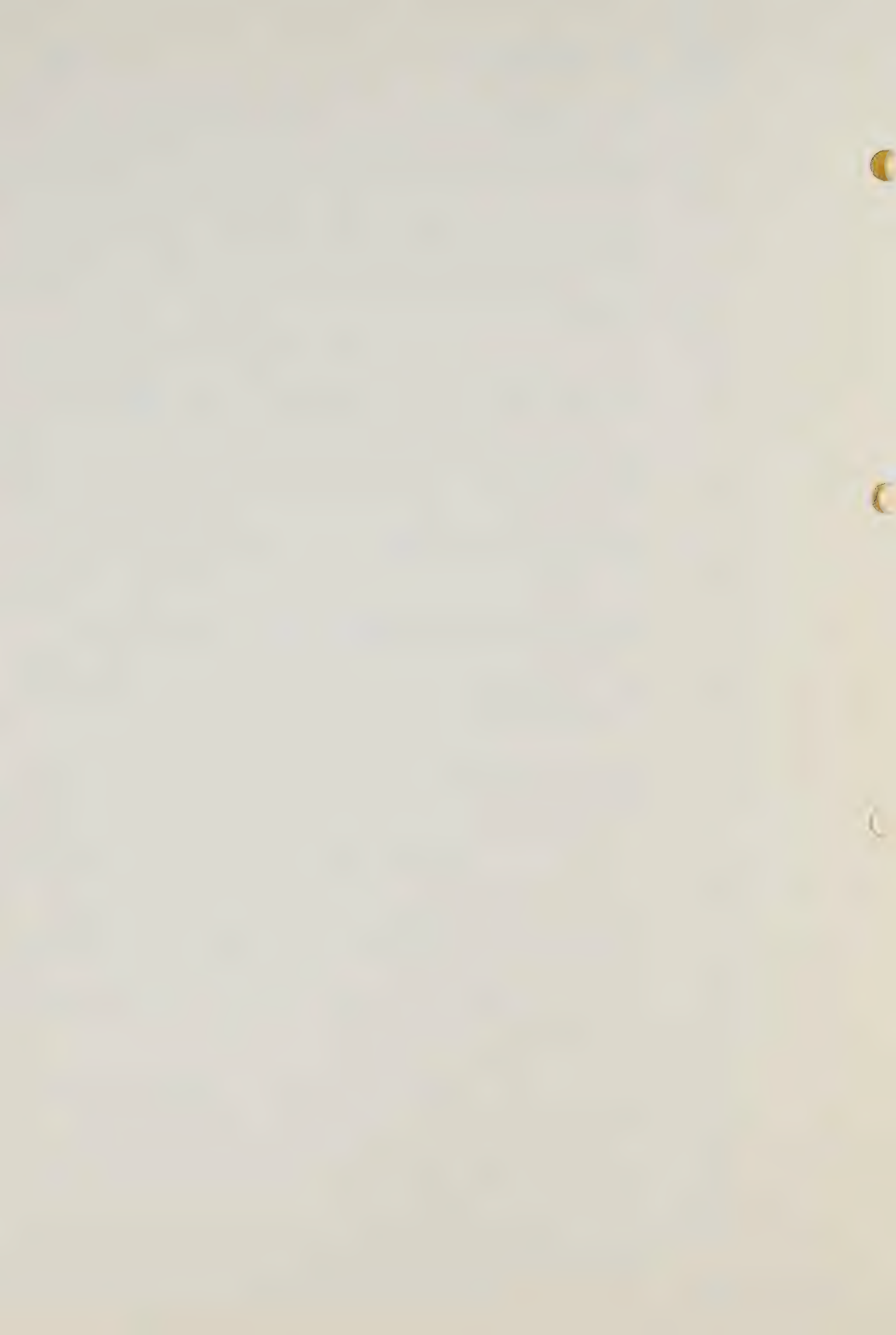


1 was the Panel which decided the question or the
2 substantive question, if there was to be a re-hearing,
3 should be Mr. Jones and Mr. LaBorde. We are really
4 fighting about the same thing in a slightly different
5 context.

6
7 And when one looks at the Reasons for
8 Judgment of Mr. Justice Mahoney, in my submission
9 one has to say that while it contains this unfortunate
10 slip, he says that what was before him is an attempt
11 to prohibit the hearing of the Canadian Pacific
12 Application for Interim Operating Authority, which is
13 patently erroneous, nevertheless he comes to the
14 reasoning which takes him to his ultimate conclusion,
15 is equally applicable to the prohibition of the
16 attempt to prohibit the proceeding which is in fact
17 taking place here and now, we are now participating in.

18
19 He held that there had been a Decision
20 on costs, there had been a Decision on the 196-197
21 Application that purportedly was adjourned, and that
22 there was jurisdiction under Section 63 of the National
23 Transportation Act for this hearing.

24
25 And he said that he would, when he
26 thought he was directing himself to the Interim
27 Application, he said that he would hate to see them,
28 hate to see Canadian Pacific be allowed to do an end
29 run around proper prohibition to the Main Application
30





1 if the, then proceeding with an Interim Application.
2 That, of course, is not what was happening but it
3 makes it clear that his Lordship was concerned, was
4 directing himself to the Main Application that he
5 would not have allowed what he thought was an Interim
6 Application to proceed if the, unless he was satisfied
7 that the Main Application should be allowed to proceed.
8

9 So that case is there and it is not
10 per incuriam, because of that slip.

11 As far as the undertaking is concerned,
12 I take it we have to consider that Mr. Justice Mahoney
13 decided that the circumstances had changed, and indeed
14 that my submission had been absolutely correct. The
15 finding has been reconsidered here because the
16 objectors have themselves changed the circumstances
17 in which Mr. Thompson and the Commission's undertaking
18 to hold off this proceeding until the question of costs
19 has been decided by their own conduct in seeking to
20 prohibit the Commission's conduct of the costs
21 proceeding; and appealing that Decision and then not
22 proceeding with due diligence with their Appeal.
23

24 So there is an undertaking in its
25 original terms if my submission is not tenable.
26

27 I should also point out in relation to
28 the basically frivolous nature of the Appeal, that
29 Mr. Justice Mahoney had a discretion to grant or
30



1 refuse the gravity of prohibition. The Federal Court
2 of Appeal will not likely interfere, in my submission,
3 with his exercise of his discretion not to grant
4 prohibition. And in all those circumstances, while
5 you might very well ordinarily grant an adjournment,
6 you would be simply allowing your own proceedings to
7 be frustrated if you granted an adjournment in the
8 circumstances. It is precisely analogous to the
9 Wardair case in my submission.
10

11 Therefore there is no basis for the
12 suggestion of bias. And in my submission you
13 certainly have a discretion to refuse the adjournment
14 as was done in the Wardair case. And in the circum-
15 stances of difficulty that you have had in doing your
16 job in relation to the court proceedings you should
17 refuse it.
18

19 Now, if for some reason I do not
20 appreciate, I am wrong in those submissions, I would
21 like to be permitted to do one thing. I would like
22 to have filed with the Commission the plans which are
23 now prepared for either underpass or overpass at the
24 Parent Avenue crossing, without any trespass on the
25 property of the City of Windsor.
26
27
28
29
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- - - - -



HH.1
PC/ko

1 That may seem like a minute detail but I would like
2 to get that at early as possible stage in the hands
3 of the Commission because ultimately this case will
4 go on. I hope it will go on this week and next but
5 your inspector, for example, should have the benefit
6 of those plans which are, which ultimately should
7 have been sent in with the original Application.
8

9 Finally -- thirdly, if I may speak
10 please with your permission to the question of
11 jurisdiction. The Application of Canadian Pacific
12 filed on the 15th of April, 1977, is for a re-
13 hearing or, alternatively, for a review.
14

15 MR. FISHER: Excuse me, Mr. Chairman.

16 MR. CHALMERS: It does not use the
17 word "review".

18 MR. FISHER: No.

19 MR. CHALMERS: May I make my own
20 argument please?

21 MR. FISHER: Pardon?

22 MR. CHALMERS: May I make my own
23 argument please?
24

25 MR. FISHER: You may make your own
26 argument sir provided it is founded on fact.

27 MR. CHALMERS: I refer to the
28 Application. It would be very useful to use my
29 friend's affidavit of A. S. Kellerman on the
30



1 Application, Exhibit R of that Application, and my
2 friends are quite familiar with it.

3 It is an Application dated April 15,
4 1977, by Canadian Pacific for leave to open the
5 Powell Sidings subject -- upon the performance to
6 the satisfaction of the Commission of whatever
7 requirements in respect to the carriage of the
8 Parent Avenue pedestrian crossing at mileage 109.30
9 thereof, over, under and along the railway as appears
10 to the Commission best adapted to remove or diminish
11 any danger or obstruction in the opinion of the
12 Commission likely to arise.

14 Two, Canadian Pacific further applies
15 for leave to carry the said sidings over, under or
16 along the said crossing on whatever terms as to watch-
17 men, overpass or underpass the Commission may require.

19 Take notice that Canadian Pacific will
20 seek to adduce an entirely fresh record of evidence
21 in support of this fresh Application to operate over
22 the said siding and crossing.

24 Now I do not particularly care if
25 someone wants to say that's a re-hearing or not.
26 There have been two arguments on that first portion.

27 Then the second portion of the
28 Application where my learned friends and I, I think
29 are agreed, it is always dangerous to say that, I
30



1 think we are agreed it is an Application for review.

2 Now, there are numerous dictionary
3 definitions. It may well be that my friends have them
4 all. I do not and I do not take great long apologies
5 for that what a re-hearing is but I should have thought
6 that a fresh period in which you adduce an entirely
7 fresh record of evidence was a re-hearing.

8
9 Now my friend Mr. Fisher will no doubt
10 argue in reply but first of all I would say in
11 anticipation that I do not anticipate -- I would say
12 that that is brought under Section 63 of the National
13 Transportation Act which has been read to you gentle-
14 men and my learned friends a number of times and it
15 reads:
16

17 "The Commission may review,
18 rescind, change, alter or vary any
19 Order or Decision made by it, or may
20 re-hear any Application before
21 deciding it."

22 Now, I gleaned that in conjunction with Section 49
23 and this is no surprise to my learned friends because
24 they have heard reference to Section 49 of the
25 National Transportation Act I made in the Federal
26 Court within the last week.

27
28 Section 49:

29 "Any power or authority
30



1 vested in the Commission may, though
2 not so express, be exercised from
3 time to time, or at any time, as the
4 occasion may require."

5 From "time to time" the Commission has
6 the power to grant operating authority under Section
7 216, has the power to grant authority to operate over
8 a crossing under Section 196 and 197 and it can
9 exercise it not only by way of re-hearing but can
10 exercise it "from time to time".

11
12 Now there is not a great body of law
13 on what "from time to time" means and most of it is
14 real property law, but the leading case and the case
15 mentioned in Strouds Judicial Dictionary at page 1120
16 is the case called Lawrie against Lees cited in the
17 English House of Lords in 1881.

18
19 THE CHAIRMAN: 1891?

20 MR. CHALMERS: 1881, seven appeal
21 cases, page 19. In that case -- it is relevant.
22 It is a case which concerns the lease of an English
23 pub and the point of the case that is relevant here
24 is that the lease was challenged because it was stated
25 that the authority to execute it should have been
26 obtained each time the lessor organization had to
27 grant a lease to one of its pubs to somebody who was
28 going to run it and it was held apparently those
29
30



1 granting the lease were a lunatic, or whatever; they
2 had power to grant leases "from time to time". And
3 there was considerable discussion on the meaning of
4 that expression "from time to time" and Lord Penzance
5 at page 29 says this:

6 "The words 'from time to time'
7 are words which are constantly intro-
8 duced where it is intended to protect
9 a person who is empowered to act from
10 the risk of having completely discharged
11 his duty when he has once acted and
12 therefore not been able to act again
13 in the same direction. The meaning of
14 the words 'from time to time' is that
15 after he has made one order he may make
16 a fresh order to add something to it,
17 or take something from it, or reverse
18 it altogether and as that meaning gives
19 sufficient force to the words and
20 explains the use of them here it seems
21 to me that your Lordships ought not to
22 go further and to narrow these words by
23 any constriction which would throw
24 impediments to the way of carrying on
25 the business, whereas the object of the
26 Act was to facilitate it."

27
28
29
30



1 As "... the object of the Act was to
2 facilitate it.", as the object of the Act under which
3 you function to facilitate the railroading business
4 as this Act was to facilitate some particular business
5 there in question.

6 So, "from time to time" in Section 49
7 means that if there is any doubt about Section 63 and
8 I am not really sure there is, it resolves it. You
9 can review, rescind, change, alter or vary from time
10 to time notwithstanding there is a decision on the
11 prior hearing from Messrs. Jones and LaBorde.

12 In addition I do not really know what
13 the difficulty is because if one wished to be
14 technical and I'm afraid my learned friends wish to
15 be technical as is their right. It is their duty when
16 it is their advantage but both sides can do that.
17 Actually there is no room for the application of any
18 principle of res judicare. It has been done, all
19 over with, but rather as far as the technical end of
20 the case goes seven or eight days after you made your
21 -- your other Panel made its Decision, as I say it
22 was, and Mr. Justice Mahoney appears to say it was,
23 then the facts are not identical if only because the
24 calendar keeps on going. There is a new day and a new
25 application can be made and I can apply without
26 particularly needing to rely on concepts of re-hearing.
27
28
29
30



1 This is a new day. The siding is still there. It is
2 in the national interest that we must use it and we
3 cannot ---

4 THE CHAIRMAN: May we have some order
5 please.

6 MR. CHALMERS: --- we cannot find
7 another location for it so we have to go ahead with
8 it.

9 THE HEARING PROCESS OFFICER: Order
10 please, order.

11 MR. CHALMERS: I can understand that
12 people feel very strongly about it. The case will be
13 put on -- in whether it is necessary or not.

14 MR. PAROIAN: Do you want to say that
15 louder? The case will be made whether it is necessary
16 or not?

17 MR. CHALMERS: The case will be made
18 on the point of location whether it is necessary as
19 a matter of law to do so or not.

20 MR. PAROIAN: Well, I hope you are
21 undertaking to do that -- a little stronger than the
22 last ones that I got because if ---

23 MR. CHALMERS: You have had no
24 undertaking from me so just settle down.

25 The other branch of the Application --
26 therefore for reasons I have advanced that there is
27
28
29
30



1 the jurisdiction to conduct a fresh hearing and that
2 is the preference of Canadian Pacific. We indeed if
3 it is done the other way in some subsequent judicial
4 review should the Application succeed we are going to
5 have the difficulty of you with respect relying on
6 the same 2600 pages of evidence by people you have
7 not seen and that might indeed be another difficulty
8 and it is another good reason having a fresh appli-
9 cation and fresh evidence.
10

11 Now, in addition, however, we have
12 asked for a review under Section 63 which can be all
13 the Decision which has been made and there certainly
14 is jurisdiction under Rule 770, Sub-section (a) for
15 review if that's what you want to do and I address
16 myself to both and in proceeding the occasion has
17 not arisen as yet for you sir to tell us what you
18 are doing here and which we got here but under Rule
19 770,
20

21 "The Review Committee shall
22 perform all functions and exercise
23 all powers of the Commission in respect
24 of any application to review an Order
25 or a Decision of a Committee pursuant
26 to Section 63 of the Act and for those
27 purposes three members of the Review
28 Committee shall form a quorum;"
29
30



1 I see with deference three of you
2 gentlemen there and:

3 "... any such application shall be
4 filed with the Secretary within 30
5 days (which could have something to
6 do with the Application within the
7 short time after the last Decision)
8 after the Order or Decision is
9 communicated to the parties unless
10 the Review Committee enlarges the
11 time for the making thereof; and

12 "The Review Committee shall
13 determine whether the Order or
14 Decision should be reviewed and may
15 then, in its discretion, either
16 dispose of the Application or refer
17 it for review to the Committee that
18 had made or issued such Order or
19 Decision."

20 I take it the Committee in that Sub-
21 section (c) in 770 is the Railway Committee.

22 Now, a review of course does not have
23 to be granted and it may well be that new hearing does
24 not have to be granted either. The question or the
25 objection that was raised was as to jurisdiction.
26 In my submission it is plain there is jurisdiction
27
28
29
30



1 and in my submission there is a discretion whether to
2 exercise jurisdiction and I will cover that although
3 it has not been objected to. It should be exercised
4 in any event. While you hear a great deal about the
5 2600 pages of evidence, the fact is -- and Canadian
6 Pacific as for so much of the history in this matter,
7 Canadian Pacific has its own -- the author of some of
8 its own misfortune so to speak I would be very
9 frank to say both in the last hearing.
10

11 Nevertheless, the hearing in result,
12 as somebody said I was here as the solicitor but it
13 appears to me to have aborted, there was evidence,
14 witnesses here in the room as is known to the
15 Commission and to my learned friends who never got
16 to give their evidence. A Decision was made on the
17 basis of disregarding evidence that was before the
18 Commission on the basis that it had to do with another
19 section of the Act, not the one on which the Decision
20 was being made, it was 196 evidence and not 216
21 evidence so we will not have regard to if Canadian
22 Pacific had been anxious to run into the Federal
23 Court and have the Commission quashed. In my view,
24 it is my submission it could probably have done that.
25 Frankly we want to get on. We didn't want to do that
26 and we didn't do it. We felt there was jurisdiction
27 here which in light of the history of this latter,
28
29
30



1 well there's a great many pages of evidence which has
2 not in fact been fully dealt with.

3 One of the points that has been made,
4 some of the points have been made here are that, oh,
5 there is possibly damage to the environment. There
6 is danger in relation to hydro wires and these are
7 very legitimate concerns of the persons in the area
8 and initially -- I wasn't here, I wasn't initially
9 with Canadian Pacific and it seems that maybe part of
10 the history of this matter that the view may have been
11 taken that was all irrelevant. All the matters were
12 relevant. This is a tribunal which has to be very
13 mindful and very much concerned with the national
14 transportation, what, in the last quarter of the
15 century I'm not sure we can simply set all those
16 matters aside and we do not propose to in this
17 hearing, if it proceeds, and indeed we have available
18 from last year's and were unable then through I know
19 possibly things we were responsible for ourselves,
20 witnesses from Hydro, witnesses as to the environment,
21 as to the noise who out of an abundance of caution
22 should be called just as we are proceeding under
23 Section 216 still out of an abundance of caution.
24 Not that we admit for a moment that this can be
25 turned into a municipal board hearing. It is still
26 a transportation hearing governed by the intention
27 evident by Section 3 of the National Transportation Act.



II-1

MCeg

1 So I submit you do have jurisdiction.

2 This is a case of greatest importance. We do fall
3 within your own decision as far as re-hearing goes.
4 We do fall within your decision in the Comsall
5 case, 24th of July, 1974 under your file P-5072 and
6 in matters of principle the case is of great
7 significance which I will endeavour to show you if
8 we get the opportunity to the National economy of
9 Canada at a particularly bad time. All of that
10 about California was not a joke. It is of serious
11 importance, or, as I say, we would not be here. I
12 do hope that you will allow us to proceed.
13
14

15 Thank you.

16 THE CHAIRMAN: Any argument in reply?

17 MR. FISHER ARGUMENT IN REPLY:

18 MR. FISHER: I would like to deal with
19 my friend's points, not necessarily in the order that
20 he presented them but firstly, the question relating
21 to the judgments of their Honours Mr. Justice
22 Mahoney and Mr. Justice Gibson.
23

24 It is important to bear in mind, I
25 believe, that the matter before Mr. Justice Gibson
26 was an application for a re-hearing. The matter
27 before Mr. Justice Mahoney was one for a prohibition
28 dealing with the composition of the Board on a
29 review or fresh application or whatever it is.
30



II-2

1 Nothing to do with a re-hearing and I repeat what I
2 said before, that is, that the Application before
3 you, Mr. Chairman, and Members of the Committee, makes
4 no request whatsoever for a re-hearing.

5 Now the matter is before the Federal
6 Court of Appeal and I believe that it would be, for
7 want of a better term, appropriate in a matter
8 questioning the jurisdiction of the Tribunal that
9 word be awaited from the Federal Court of Appeal.

11 I join with my friend, Mr. Paroian,
12 in assuring the Committee if this is a concern, that
13 that appeal will be expedited as quickly as possible.

14 Now my learned friend, Mr. Chalmers,
15 indicates that there were witnesses available who
16 were not called. I suppose that my answer in a
17 nutshell is that's tough luck. There was an
18 application made. An exhaustive review of everything
19 and every opportunity in the world given to call
20 all and any evidence and yet, notwithstanding that,
21 apparently there were people in the room who weren't
22 heard.

23
24
25 Well should that operate to the
26 prejudice of those resisting the application? Should
27 those in resistance now be called upon to say "Oh,
28 well, fine. Let's have another go."

29 That must all be considered bearing in
30



II-3

1 mind that the question of jurisdiction is before
2 the Federal Court of Appeal.

3 Now I am not trying to be
4 argumentative I assure you, Mr. Chairman, but I am
5 most concerned over possessing knowledge of the
6 position of the Committee with respect to the
7 question of costs.
8

9 Mr. Justice Gibson and Mr. Justice
10 Mahoney have made totally different findings on that
11 issue. Both of them have said -- one of them has
12 said I find that there has been no decision. The
13 other has said I find there has been a decision and
14 that was the reason that prompted me to ask you
15 earlier, sir, what does the Committee say because
16 surely if the Committee feels that there has been
17 no decision on costs then the words of Mr. Justice
18 Mahoney are very very burdensome to my friend indeed.
19

20 I think it is clear from a reading of
21 His Lordship's Judgment that if he felt that the
22 question of cost was outstanding then the undertaking
23 of the Committee was still binding.
24

25 Now surely when you have that
26 background -- two Judges, two different findings --
27 one of them talking about the strengths and
28 meaningful nature of the undertaking and both of them
29 being in appeal, surely the proper thing to do is
30 to wait and hear what the Appeal Court has to say



II-4

1 concerning jurisdiction.

2 My friend would have you believe that
3 Section 43 of the National Transportation Act
4 confers jurisdiction of some kind.

5 MR. CHALMERS: 49.

6
7 MR. FISHER: 49. I beg your pardon,
8 but if you peruse Section 49 you will see that it
9 refers to jurisdiction that is vested in the
10 Committee. It doesn't create any jurisdiction. It
11 doesn't add any jurisdiction. It doesn't clothe
12 the Committee with any further jurisdiction. It
13 merely mentions that jurisdiction which the
14 Committee possesses and says merely that may be
15 exercised from time to time and that as the excerpt
16 from the authority quoted indicates that one of the
17 purposes that can be exercised from time to time is
18 to add to or take away or what have you. That only
19 makes sense but it does not add any jurisdiction.
20

21 I take the strongest possible
22 exception to the suggestion that there has been an
23 application for re-hearing. There is no such
24 application before you at all and indeed, how can
25 there be when Mr. Chalmers himself indicated that he
26 agreed that Messrs. Jones and LaBorde made a
27 decision. They did make a decision on Section 216
28 and that decision was that the appeal was dismissed.
29
30



115

1 How could there possibly be a re-hearing
2 when Section 63 says that can only be done before
3 the question has decided.

4 I also think it is rather, with all
5 respect to my friend, rather cavalier in his
6 asking the Committee to take a cavalier attitude
7 as well to characterize the appeal as frivolous.
8 With the greatest of respect to my friend I suggest
9 to you that when you have two Judges of equal
10 jurisdiction making opposite findings that it is
11 preposterous, totally preposterous to suggest that
12 an appeal under those circumstances is frivolous.
13

14 I note that my friend made another
15 observation about the judgment of Mr. Justice
16 Mahoney. Unless I heard him incorrectly I believe
17 he indicated that Mr. Justice Mahoney indicated
18 circumstances have changed with respect to the
19 undertaking. I don't think the Judgment warrants
20 any such statement at all. I think that is
21 hypothetical. I think that is possibly what Mr.
22 Chalmers would like to have heard His Lordship
23 say but that is not what the Judgment says. The
24 Judgment is founded upon one principle and one
25 principle only that the 196 and 197 application has
26 resulted in a decision and the question of costs
27 has resulted in a decision and for that reason
28 the undertaking is no longer valid and why that
29
30



II-6

1 becomes so important, Mr. Chairman, is that the
2 people who appeared before you have some idea as to
3 what position the Committee is taking with respect
4 to that motion for costs and I respectfully submit to
5 you, sir, that Order No. 25R-112 I think it is or
6 whatever it was, specifically says in the preamble
7 that they were not able to agree. The Judgment
8 doesn't support any such statement which my friend
9 would have you believe is enshrined in the Judgment.
10

11 I also think it is interesting tthat
12 Mr. Chalmers would have the tamerity and unmitigated
13 gall to suggest to you that there must be a time when
14 you stop giving adjournments and yet there appears
15 to be no end to the number of new applications that
16 can be entertained. It's a rather remarkable
17 proposition I should think.
18

19 I think it is an unseemly thing, if
20 I may use that term, Mr. Chairman, that is not said
21 disrespectfully because we haven't heard your
22 decision but it could appear very unseemly when two
23 appeals of that nature with two different Judges and
24 two different findings if this Committee were to
25 proceed on in the face of that.
26

27 My friend has also indicated that Mr.
28 Justice Mahoney made an unfortunate slip when he
29 referred to the application under consideration as
30



II7

1 being the one dated August 10th. Again that is at
2 best wishful thinking of my friend. Who is to say
3 that that was an unfortunate slip or that was
4 pivoted to His Lordship or whatever. I hardly
5 think it lies in the mouth of my friend to indicate
6 what is an unfortunate slip.

7
8 The only other point that I would
9 like to make is to refer for your consideration to
10 a previous Decision of the Board of Transport
11 Commissioners dated the 18th day of January, 1946.
12 I am not familiar with these but I believe it's a
13 Judgment of Commissioner Stoneman but if I might
14 just read from the headnote I think it accurately
15 sets forth the material.

16
17 It refers to a County applying for
18 reconsideration of an Order of the Board made in
19 1916, 1917 and 1918 respectively and that Order
20 apportioned the costs of a watchman and so on. It
21 was contended, in support of the application, that
22 as the County has no jurisdiction over highways at
23 a particular crossing it was not affected and so on.

24
25 There was another issue in it and
26 the headnote reads as follows:

27 "The practice, generally speaking,
28 has been that cases will not be
29 re-opened except under changed
30



II 8

1 circumstances or to rectify errors
2 which appear to have occurred through
3 want of information, oversight or
4 otherwise."

5 In the present case there has been no
6 changes of circumstances nor has any new evidence
7 been submitted which could not have been presented
8 at the time the Orders were made 27 years ago (in
9 this case), but clearly the principle is the same
10 and:
11

12 "In the Board's opinion it would not
13 be reasonable or proper to grant a
14 review of a Decision in effect for
15 such a long period of time."
16

17 Now obviously we aren't dealing with
18 the same time element, I agree. I quite recognize
19 that but surely the principles are the same. Surely
20 they are identical.
21

22 Now I would also ask that, Mr.
23 Chairman, you and the Members of the Commission
24 bear in mind the arguments made by Mr. Dumont with
25 respect to the jurisdiction of the Review Committee
26 set up under the Rules which appear to say the
27 Review Committee has jurisdiction and only
28 jurisdiction for those matters under Subsection 4
29 of Section 24 which are related to objections made
30



II-9

1 by the operator of another mode of transport.

2 Here we have a peculiar situation
3 with an operator of a mode of transport who is
4 objecting to an Order concerning itself. It is not
5 two railways fighting. It is one railway apparently
6 objecting to an Order which it is involved. In
7 other words, it is a totally different situation
8
9 24 Sub 4 envisages.

10 I don't think I can add anything
11 further, Mr. Chairman.

12 THE CHAIRMAN: Thank you.

13 MR. PAROIAN: I would just like to
14 make a comment or two on my friend's opening
15 remark that even if a motion is brought he, with
16 his great corporate power, has barristers available
17 to proceed in Court while you proceed here.

18 Picture that if you will and just ask
19 yourself if that is anything that the three of you
20 in all conscious could tolerate and I don't think it
21 is.

22 The suggestion that be done, with the
23 greatest of respect to my friend who I don't believe
24 is making this submission personally believing it
25 but it demonstrates the arrogance of his client.

26 Proceed even if they go on to Court.

27 I cannot believe my learned friend personally
28 subscribes to such a theory.
29
30



JJ-1

NGeg

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The second point I should like to address myself to, and my friend Mr. Fisher has covered most of them, and I will try throughout not to cover the same ground.

MR. CHALMERS: Is it the practice of the Commission to have two replies to one argument?

THE CHAIRMAN: There were two arguments in support of the motion so I thought that it would be best to give everyone a fair chance to be heard than to have arguments about the subject.

MR. PAROIAN: We are attempting, and I think you will note that we attempted in our argument not to cover the same ground.

The suggestion that these proceedings brought by the respondent is vexatious taxes what little credibility CPR has to the breaking point. For counsel for CPR to stand here and say that they can day by day bring a new application to you, presumably until they find a favourable result, but that the respondents --

MR. CHALMERS: We can get vexatious too.

MR. PAROIAN: You have already gotten to be vexatious. The CPR has demonstrated that -- not you personally Mr. Chalmers, but your Corporate client has demonstrated an arrogant



JJ-2

1 disregard for the law of this country. And all the
2 smoothing that you do so beautifully just would not
3 work. There is an old Armenian expression which is
4 rather vulgar and I would not use it. But it tells
5 what happens to things that's not very pleasant by
6 odour, after the snow melts. Your client has been
7 trying to cover up too many things with snow and
8 the spring has come and gone three or four times.

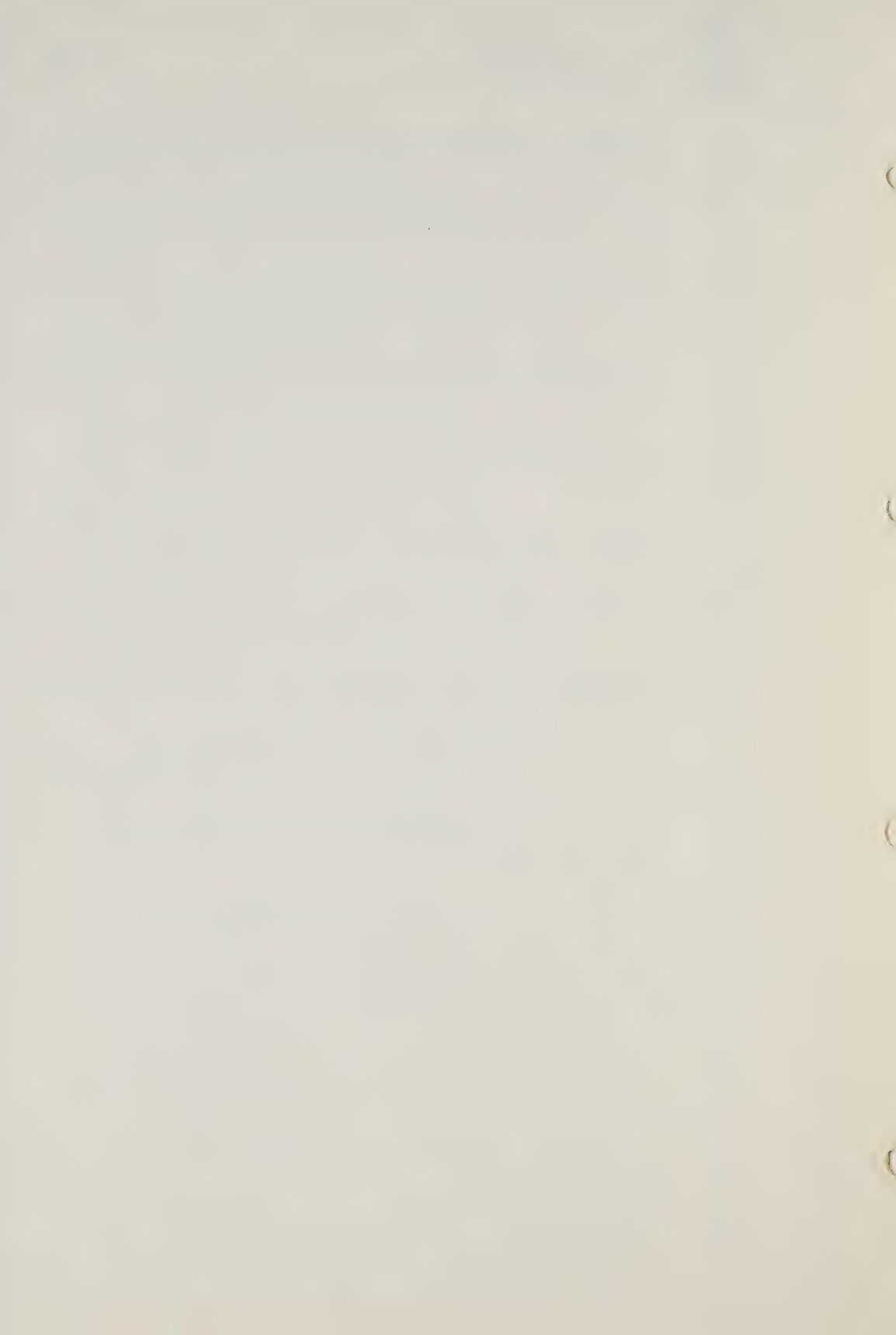
10 That is a very good point, I should
11 address the Commission I suppose you will make
12 the same comment to yourself. The vexatiousness of
13 their proceedings is demonstrated by looking at
14 paragraph 8 of their application. This application,
15 I gather that to mean the fresh application:

17 "...and alternative applications are
18 brought on the grounds, (a) ..."

19 Listen to this.

20 "... that the Decision of April 5th,
21 1977 referred to was in the
22 circumstances made without a full
23 inquiry into all of the evidence
24 notwithstanding the number of days
25 occupied by the hearing."

26
27 That's what this company is saying. We want a right
28 of appeal, not a re-hearing but a right of appeal
29 because your two-brother Committee men were either
30





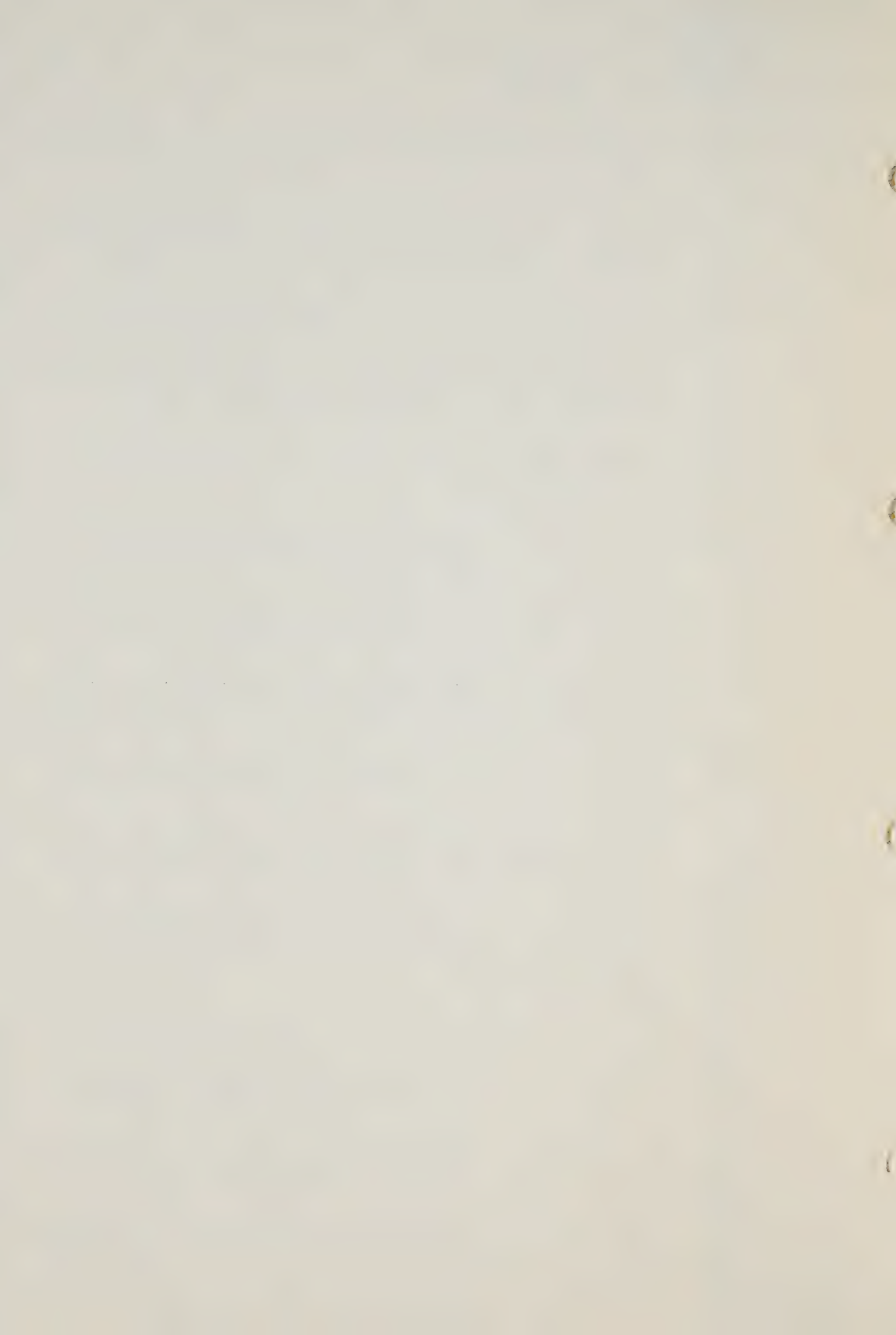
JJ-3

1 guilty of avarice or stupidity. That's what he is
2 saying.

3 But it was the CPR, remember, who
4 handled its entire case as it saw fit. There
5 wasn't a witness called by the objectors except the
6 one evening when they spoke as they did here and
7 they went a little further that night as to a
8 broader issue. But there was no case called by
9 the objectors.
10

11 The CPR had a full hearing that
12 could have gone on and were invited time and again
13 by Mr. Jones to ask themselves whether this was
14 their case. And whether they were closing. And
15 Mr. Jones did not get them to close it, they elected
16 to close it. And now they come along and say, we
17 closed it but you were wrong for letting us close it,
18 I guess that's what paragraph 8 says. That's not
19 vexatious. And we will do it again, they say,
20 tomorrow if you do not give us this application.
21 And (b):
22
23

24 "The importance of this application
25 to International Trade of Canada,
26 Canadian Pacific Limited and the
27 public of the City of Windsor
28 justifies and requires a full inquiry
29 without regard to the conduct of the
30 parties appearing before the





JJ-4

1 Commission including the Applicant."

2 Well, I would want to guess that's so
3 because if you got into their conduct we know what
4 would happen.

5 "... may have created the erroneous
6 impression that the Commission's
7 inquiry was simply a dispute between
8 private parties."

9
10 and with the greatest of respect Dr. Bricker has
11 already hit that right on the head.

12
13 Mr. Jones and Mr. LaBorde asked and I
14 believe ordered certain information to be delivered
15 to this Committee, to that Committee, that panel of
16 this Committee, relative to what the line was being
17 used for, what it was going to be used for and in
18 fact some information did come forth showing the
19 commodities that were at that time being used.

20
21 He asked for it. He did not get it
22 all. And they now say, forgive us, our case was
23 not handled very well. But we do not want to go to
24 Court or anything, we just want another crack at the
25 cookie. And he has the unmitigated gall to say as
26 Mr. Fisher says, I do not adopt Mr. Fisher's words
27 on that. He has the unmitigated gall as Mr.
28 Fisher says to call us to suggest that we have been
29 using vexatious proceedings. In (c) he says:
30



JJ-5

"There is nothing in the existing
dismissal ----"

I had better go back to (b) for a minute.

Without regard you are supposed to
hear, Mr. Jones and Mr. LaBorde were supposed to
conduct that whole hearing he says, without regard to
the conduct of the parties appearing before the
Commission. Just think about that, just think about
that very carefully. You adopt that or reject it,
but give us a reason for doing either. Because I do
not believe that that statement could ever stand,
because it defies common sense let alone good
judicial thinking. Because the conduct of the
parties is clearly something that should be before
you, particularly when you are being asked to exercise
a discretion.

In (c) he says -

"There is nothing in the existing
dismissal of the previous
application of Canadian Pacific
Limited on a purported motion for
non-suit after a purported closing ...
purported closing of its case by
Canadian Pacific Limited to preclude
a new and full inquiry."

Let me stop there. How do you have a



JJ-6

1 purported closing when Mr. Jones asked and asked
2 CPR, are you finished, is that your case? Are you
3 sure that's your case? Yes, that's our case. And
4 he comments on it in his Decision, that's the
5 purported closing. No, no, with the greatest of
6 respect it was a closing, it was an election made by
7 Canadian Pacific Limited. And that election, if
8 we say my friend is right, what they can do then is
9 put in just enough evidence in this case, that they
10 think is enough and they lose. And they come along
11 next week and they put a little more in and they lose
12 that one and they call up the boys in the back room
13 and they say, we need some more evidence guys. Then
14 there is a train / ^{parked} down here on Crawford Avenue
15 where they park their trains and they just bring in
16 more guys each time. And sooner or later they get a
17 Committee that they say, right, we have got enough
18 evidence now and we will overwhelm them. We have
19 had it all the time but we have sat on it.

20
21 They had the conduct of that case.
22 They elected to close their case. It was not a
23 purported closing, it was an actual closing after Mr.
24 Jones repeatedly asked them if they were sure they
25 knew what they were doing.

26
27 And my friend, my learned friend sat
28 throughout all of it and his instructing solicitor
29
30



JJ-7 1

2 must have had some input as to whether they were
3 going any further or not. But to call that a
4 purported closing is an abuse of process.

5 And in light of the public importance
6 of both the operations of the sidings sufficiently
7 to conduct international trade over the Detroit
8 gateway as a safe and unobjectionable
9 operation from the point of view of the Windsor
10 community such a new and full inquiry should be
11 undertaken.

12 We had clearly put into issue in that
13 proceeding, having filed very formal pleadings, the
14 entire matter of the environmental concerns, the
15 safety concerns, and what we felt were objectionable
16 uses. They were clearly delineated in those
17 documents in our replies, or in our answers and
18 their replies. To say now that we did not know
19 that that was what you were thinking about and we
20 really want to go have another crack at the cookie.
21 Talk about vexatious.

22 Now the last part of all this, ^{/the}greatest
23 insult to you, what you should do, with the greatest
24 of respect, is not only adjourn this but throw CPR
25 right of the Court, right out of this room.

26 a
27 "While lack of such/full inquiry may
28 have amounted to a declining of
29
30



JJ-8

1 jurisdiction by the Commission, no
2 useful purpose will be served by
3 technical explorations of nice
4 questions of administrative law in
5 the regular Courts at this stage when
6 it is still possible to obtain in the
7 Commission a full inquiry and a
8 result permitting operation of the
9 sidings and pedestrian crossing in a
10 safe and unobjectionable manner."
11

12 What he is saying there, Jones and LaBorde goofed.
13 We do not have the guts, they sure got the
14 wherewithal, they have got it lined up in Toronto
15 right now ready to take us on if we dared tomorrow
16 morning to do anything. They sure haven't got the
17 guts, though, to go to the Courts to find out
18 whether Jones and LaBorde were wrong so what we
19 are going to do is to come back and have another
20 shot at the cookie. And he dares to suggest, CPR
21 dares to suggest in the most able argument put by
22 my learned friend, that of course they are not
23 coming before you abusing this process.
24

25 With the greatest of respect his own
26 grounds demonstrate an abuse of process that's
27 vexatious to the point requiring you to not only
28 grant the application that we have requested but to
29
30



JJ-9

1 make it unequivocally clear that this Corporate
2 giant cannot continue on in such a fashion. Because
3 the honourable thing to have done, and the appropriate
4 thing to have done, if they really believe that
5 Messrs. Jones and LaBorde were legally incorrect or
6 that any of these statements were supportable, they
7 should have taken them to court,
8

9 But rather they sat back and sought
10 out a new panel. There are very serious matters
11 of jurisdiction, they are very serious matters that
12 have been decided by two Judges with an apparent
13 inconsistency on the face of their own record,
14 their own records. There is nothing in CPR's reply
15 to our argument that does other than support our
16 argument for an adjournment until that matter has
17 been resolved by the Court.
18

19 You see, there is no evidence as well
20 before you, not a bit, that supports any statement
21 as to the importance of these tracks, or that they
22 are necessary at all.
23

24 My friend says he will raise that.
25 But they had 19 days of hearing, I think it was 19,
26 I will stand corrected on that number, it may have
27 been a little bit more or it may have been a little
28 less, it seems like 990, but there were a large
29 number of days consumed with, remember, CPR to back
30



JJ-10

1 them. They were up first, they were the Applicant.
2 They could call whatever they wanted. And they had
3 our pleadings in their hands. There was no
4 evidence as to the great importance of this.
5

6 We had to serve a notice to get a
7 documentation from them. And then only after prying
8 it out of them. The cross-examination on every
9 witness trying to get to this important question
10 was always missed. And we subpoenaed finally the
11 President of the Company. We said, my God there is
12 the man that's got to know it, we will bring him
13 down here. Unfortunately before we got the chance
14 to do it -- he was going to be our witness, before
15 we got a chance to call him as a witness and to put
16 him in the box the matter was dismissed, or the
17 motion was not granted.
18

19 Why didn't they call their President?
20 The Vice-President sat right here throughout. Why
21 didn't they call him to tell^{him}/how important it was?
22 If they did I missed it. Why wouldn't they call him?
23 And there is not a bit of evidence before you right
24 now except Mr. Chalmers' suggestion, as to how
25 important this is to international trade. Bunk um.
26

27 If you ever get into this matter you
28 are going to find that a lot of the things that
29 said here today are not supportable by fact. CPR is
30



JJ-11

1 going to have to start looking at some of its
2 exhibits that were filed in that last matter. And
3 they are going to have to answer where were we when
4 that was filed? How can we now be saying that this
5 was not done? How can we now be saying we should
6 have been arguing that international trade was so
7 important when their very own justification document -
8 what do you call that thing? The appropriation of
9 funds spoke in terms of the necessity for sulphuric
10 acid cars, was it? And all of a sudden they are
11 talking about sulphuric acid cars from where? Not
12 from Dallas, Texas or any place like that that they
13 are talking about.
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KK.1
PC/ko

1 You are going to find the evidence
2 isn't going to match.

3 Let's get back to the basic three
4 issues: do you have jurisdiction to hear this? In
5 our submission, you do not. They did not request it.
6 My friend did a beautiful job, my learned friend,
7 Mr. Chalmers, in skating over that paper thin ice
8 but he fell in. He never did tell you he really
9 applied for a re-hearing. He could never demonstrate
10 to you in his Application that he applied for a re-
11 hearing. That is fatal.

12 Now, they have not applied for a re-
13 hearing. They cannot now bring on a fresh Application
14 either. In my submission you have no jurisdiction
15 or if you have any jurisdiction at all it is to
16 dismiss this Application.

17 Secondly, on the question of bias you
18 have heard the people and we have made our arguments.
19 There is a great concern, particularly when you read
20 paragraph 8 that they are coming back for a second --
21 they are calling in a little more evidence and they
22 want a second tribunal to hear it, a second panel of
23 the same tribunal and if they lose it, as Mr.
24 Chalmers said in his opening: another day, another
25 application. That surely cannot be what this is
26 about. To allow it is to tax your own conscience.



1 Thirdly there is not one argument or
2 one tiddle of evidence before you to demonstrate that
3 these hearings ought not to be granted. The evidence
4 is that the adjournment should be granted.

5 Again I want to underscore the fact
6 that remember these people are not the wrongdoers.
7 CPR were found to be the wrongdoers, the breachers
8 of the law of this country and I appreciate my friend
9 would like to have you forget they are lawbreakers
10 and the people did not delay this matter for the three
11 years, never once did they but they are taking their
12 rights to the courts at no small expense to themselves
13 and to foreclose them an opportunity of having those
14 rights determined by the courts on matters that are
15 obviously in conflict when you have two judges in
16 the same court disagreeing on at least the fact. It
17 is with the greatest of respect in these particular
18 circumstances inappropriate in our submission. It is
19 in the inequity and on the facts and on the circum-
20 stances and on just decent fair play. They deserve
21 the right to take their case further if they wish
22 but we would be hopeful that you would endorse that
23 so that it can be determined so that when the matter
24 comes back before you or before your Committee who-
25 ever, whichever Committee it may be or whatever it
26 is composed of, the basic issues will have been
27
28
29
30



1 resolved as to the technical legal questions that my
2 friend was so charry to take on to court.

3 In our submission an adjournment is
4 appropriate but again, and I am repeating myself, if
5 you are determined that it is not please tell these
6 people in unequivocal language how that can come about,
7 why that can happen to them when this giant lawbreaker
8 has seemed to have so many opportunities for having
9 broken the law with impunity whereas all they want
10 to do is not break the law but have the law determine
11 a very fundamental question as to the rights and to
12 remember we all know that it would be academic if
13 you do not grant the adjournment.
14

15 Those are my submissions gentlemen.

16 Thank you.
17

18 THE CHAIRMAN: Thank you. It is now
19 five o'clock. There is no hope of us being able to
20 give you a Decision on the Application or Motion this
21 afternoon. We will take the matter under consider-
22 ation and hopefully, and I say hopefully we will be
23 in a position to give you our Decision in the morning.
24

25 We will now adjourn until ten o'clock
26 tomorrow morning.
27

28 --- WHEREUPON THE HEARING ADJOURNED UNTIL 10:00
29 A.M. ON TUESDAY, NOVEMBER 29TH, 1977.
30

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